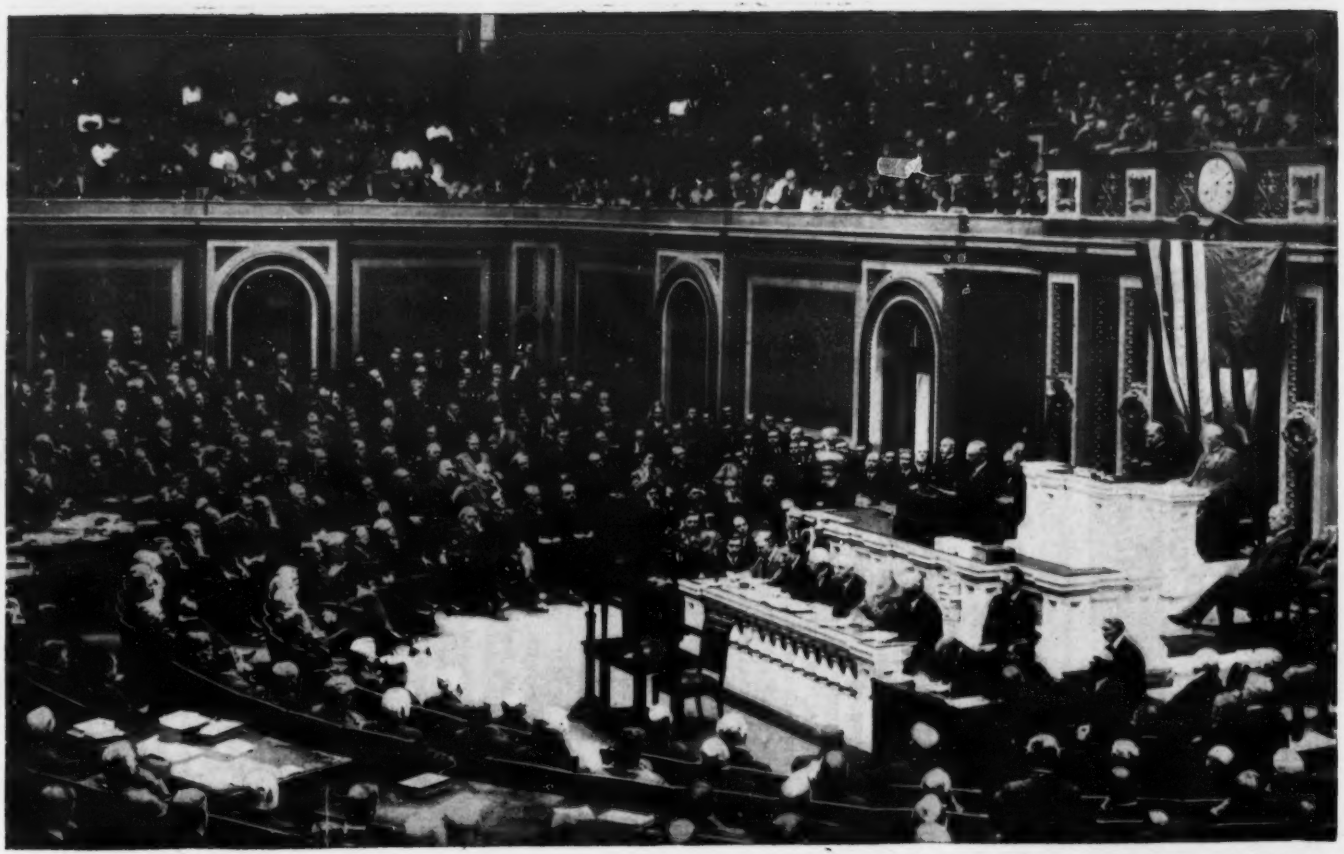
Case and Comment

The Lawyers Magazine

President Wilson on Ineffectuality of Armed Neutrality

When I addressed the Congress on the twenty-sixth of February last I thought that it would suffice to assert our neutral rights with arms, our right to use the seas against unlawful interference, our right to keep our people safe against unlawful violence. But armed neutrality, it now appears, is impracticable. Because submarines are in effect outlaws when used as the German submarines have been used against merchant shipping, it is impossible to defend ships against their attacks as the law of nations has assumed that merchantmen would defend themselves against privateers or cruisers, visible craft giving chase upon the open sea. It is common prudence in such circumstances, grim necessity indeed, to endeavor to destroy them before they have shown their own intention. They must be dealt with upon sight, if dealt with at all. The German government denies the right of neutrals to use arms at all within the areas of the sea which it has proscribed, even in the defense of rights which no modern publicist has ever before questioned their right to defend. The intimation is conveyed that the armed guards which we have placed on our merchant ships will be treated as beyond the pale of law and subject to be dealt with as pirates would be. Armed neutrality is ineffectual enough at best; in such circumstances and in the face of such pretensions it is worse than ineffectual,—it is likely only to produce what it was meant to prevent; it is practically certain to draw us into the war without either the rights or the effectiveness of belligerents. There is one choice we cannot make, we are incapable of making; we will not choose the path of submission and suffer the most sacred rights of our nation and our people to be ignored or violated. The wrongs against which we now array ourselves are no common wrongs; they cut to the very roots of human life.

With a profound sense of the solemn and even tragical character of the step I am taking and of the grave responsibilities which it involves, but in unhesitating obedience to what I deem my constitutional duty, I advise that the Congress declare the recent course of the Imperial German Government to be in fact nothing less than war against the government and people of the United States; that it formally accept the status of belligerent which has thus been thrust upon it; and that it take immediate steps not only to put the country in a more thorough state of defense, but also to exert all its power and employ all its resources to bring the government of the German Empire to terms and end the war.—From Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress, April 2, 1917.



PRESIDENT WILSON ANNOUNCING TO CONGRESS SEVERANCE OF RELATIONS WITH GERMANY.

Case and Comment

VOL. 24 JUNE 1917 No. 1

The Effect of War on Constitutional Liberty

BY HENRY WINTHROP BALLANTINE

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THE recent shooting of various harmless individuals by armed guards for failure to yield instant obedience to their orders to halt illustrates the dangerous misapprehension that exists in regard to what military authorities can and should do in dealing with peaceable citizens.[1] It has even been suggested that the President might declare martial law throughout the country and proclaim national prohibition as a war measure.

These mistaken notions are expressed in general form in a paragraph of the report of a committee of the New York State Bar Association: "In the time of war the laws are silent; during the war civil rights may be suspended at the will of the Commander in Chief. The Constitution does not inure to the benefit of the public enemy, of spies, or of enemy sympathizers." (Third Report of the Committee upon the Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law, January, 1917, p. 23.)

The learned members of this committee had evidently not read the cases in the reports of their own state bearing on these propositions; otherwise they would have avoided egregious error. They fail to grasp the distinction between the powers of a commander occupying hostile territory with an invading army and his powers in domestic territory (see Cushing, 8 Ops. Atty. Gen. at p. 369). They fail to apprehend the distinction between spies who penetrate in disguise the enemy lines and are taken within the zone of operations, and "espionage" by enemy

[1] See Com. ex rel. Wadsworth v. Shortall, 206 Pa. 165, 98 Am. St. Rep. 759, 55 Atl. 952, 65 L.R.A. 193. This case is unsound in so far as it justifies shooting for mere disobedience of orders. Only if the sentry had some reasonable ground to believe that it was necessary to shoot to prevent dynamiting or felonious violence would he be justified in enforcing his orders with a gun. See comment in 12 Columbia L. Rev. 530.

A discussion of the authorities dealing with the limits on the exercise of military power over the citizen will be found in the following: Martial Law—12 Columbia L. Rev. 529; Military Dictatorship—1 Cal. L. Rev. 413; Unconstitutional Claims of Military Authority—24 Yale L. J. 189; 5 Journal Crim. Law & Criminology, p. 718; Qualified Martial Law—14 Mich. L. Rev. 102, 197; Suspension of Habeas Corpus in Strikes—W. W. Grant, 3 Va. L. Rev. 4; Martial Law and the English Constitution—H. M. Bowman, 15 Mich. L. Rev. 93; 2 Willoughby, Const. chap. XXI., LXII., § 733.

sympathizers resident in this country. Persons accused of treason or espionage may not be seized and shot as spies by the military authorities.

In Smith v. Shaw, 12 Johns. 267 (1815), it was held that a citizen of the United States not in military service is not amenable to court-martial on a charge of spying even in time of war. The charge against Smith is indicated in the following quotation from the opinion of Judge Thompson:

> He offered to prove that the plaintiff was committed to the provost guard by Hopkins and Findley, who were officers of the Army of the United States, charging him, the plaintiff, in writing, with having excited mutiny among the citizens of the United States, violating his parole as a prisoner, and engaging in an illicit trade, and furnishing the enemy with necessaries from the United States, and being an enemy's spy in time of war between Great Britain and the United States. It appeared in evidence on the part of the plaintiff below, that he was a naturalized citizen of the United States, and was arrested by Findley and Hopkins at a place called Adams, about 15 miles distant from Sackett's Harbor, where the army was stationed.
>
> None of the offenses charged against Shaw were cognizable by a court-martial, except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offense. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy. There was, therefore, a want of jurisdiction, either of the person or of the subject-matter, as to all the offenses alleged against the plaintiff. There can be no doubt but that Hopkins and Findley were trespassers. . . .
>
> If the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority.

See also Ex parte Henderson, Fed. Cas. No. 6,349 (1878).

In Jones v. Seward, 40 Barb. 563 (1863), the plaintiff was arrested by order of the defendant, Seward, as Secretary of State. He sued for false imprisonment. The court says:

> That the President can of his own accord assume dictatorial power, under any pretext, is an extravagant assumption. The proposition cannot be entertained by any court; no such inquiry can arise under the Constitution of the United States; it does not reach to the proportions or stature of a question.
>
> It is, however, maintained, if the President does not possess this power in his civil capacity, that he does possess it in his military capacity, as Commander in Chief of the Army and Navy of the United States. A commander of an army has, of course, within the sphere of his military operations against an enemy, all power necessary to insure their success. General Rosecrans had a right, I have no doubt, the other day, to destroy all property which caused any obstacles to his operations against Bragg; and if he discovered any plots to mar those operations or to give intelligence to the enemy, or to afford them any kind of aid or comfort, he would have a right to try the offenders, whether civilians or soldiers, by court-martial. But his power does not extend beyond his lines. If a man at Cincinnati has a correspondence with Bragg, giving him intelligence of the plans of Rosecrans, the latter cannot have the offender arrested at Cincinnati, brought within his lines, and tried by a court-martial. This man is, indeed, emphatically a traitor; he is guilty of high treason against the United States of America; but he is to be tried by a civil tribunal, according to the course and practice of the established law, on a presentment or indictment of a grand jury. His case has not arisen in the land or naval forces, or in the militia when in actual service in time of war or public danger. See Const. 5th Amend. Although it indeed affects the operations of a certain portion of the land forces, it is not a military, but a civil, offense. Neither can even the commander in chief of the army extend martial law beyond the sphere of military operations. . . .
>
> Within the immediate theater of insurrection or war, the commander in chief and his subordinates, where the exigencies of the occasion make it necessary, we repeat, do possess it; beyond it the ordinary course of proceedings in courts of justice will be sufficient to punish any persons who furnish information or afford any aid or comfort to the enemy, or in any way are guilty of the detestable crime of betraying their country.

The case of Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159, held that residents of loyal districts outside of the actual field of military operation could not be arrested on the order of the President upon accusation of being Knights of the Golden Circle in sympathy with the rebels and plotting to overthrow the government (August 28, 1862). It was held that a state of war does not suspend the constitutional guaranties and the liberty of the citizen. Neither war nor rebellion in one part of the country prima facie suspends the law in other parts thereof. The test whether a state of war or peace exists at a given time and in a given part of the country is whether the courts are open and whether it is the theater of active military op-

erations (Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281).

During the Civil War, when the integrity of the nation was threatened, those in sympathy with the Rebellion extended their secret operations into the northern states with the aid of such plotters as the Knights of the Golden Circle. The President, by proclamation of September 24, 1862, declared that all aiders and abettors of the rebels and all persons in the United States guilty of disloyal practices were subject to martial law and liable to trial or punishment by military commission.

In Ex parte Milligan, supra, it was held that the military court which, in 1864, tried Milligan for treason and sentenced him to death, was without jurisdiction; this for the reason that the court sought to exercise jurisdiction in the state of Indiana, which was not the theater of actual warfare; and as the courts of that state were open, they alone had jurisdiction. The Supreme Court laid it down that no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of the provisions of the Constitution can be suspended during any of the great exigencies of government.

The constitutional question actually decided in the Milligan Case was that this proclamation of the President was utterly incapable of authorizing military trials of civilians. All that was attempted in this case was done by the Executive Department alone. The majority of the court in a strong *dictum* declared that it was not within the power of Congress, any more than of the President, to authorize military trials of civilians in peaceful areas, and that the guaranty of trial by jury was intended for a time of war, as well as for a time of peace. Chief Justice Chase and three other justices dissented from this *dictum*, arguing that when a part of the country is invaded, Congress may authorize military tribunals for the trial of crimes and offenses by civilians against the security of the national forces and the public safety, as incidental to the war power.

In Moyer v. Peabody, 212 U. S. 78, 53 L. ed. 410, 29 Sup. Ct. Rep. 235, the Supreme Court recently held that the state military authorities engaged in suppressing rioting and disorder during a strike might arrest and imprison strike leaders suspected of complicity in mob violence, without depriving them of liberty without due process of law. The decision of the lower court was affirmed that the governor could not be sued for false imprisonment, although the arrest was made without warrant and the detention was without reasonable ground, if the measures were taken in good faith. The anomaly of this decision lies in holding it due process of law for the executive to imprison persons at his discretion, not merely to overcome force with force, but to intern those suspected of being the fomenters of trouble, without turning them over to the ordinary courts. This goes beyond the temporary detention of rioters to prevent apprehended harm, which is, of course, justifiable in dealing with necessities of a critical moment.

But Moyer v. Peabody, like Luther v. Borden, 7 How. 1, 12 L. ed. 581, only decides that there was no ground upon which the Federal courts could question the authority of the government or officers of the state. There was no question at issue about the power of declaring martial law under the Federal Constitution. The language in both of these cases, however, is dangerously sweeping and unqualified, and has given rise to very erroneous notions.

The English Privy Council in Ex parte Marais [1902] A. C. 109, 71 L. J. P. C. N. S. 42, 50 Week. Rep. 273, 85 L. T. N. S. 734, 18 Times L. R. 185, a case arising during the Boer War, held that once let the status of actual war be established, and the civil courts have no jurisdiction to call and question measures taken by the military authorities. This case differs from earlier authorities in holding that the fact that civil tribunals are pursuing their ordinary course is not conclusive that actual war is not raging at the time and place in question.

The West Virginia supreme court of appeals has upheld the action of the governor of West Virginia in ousting the ordinary courts of their jurisdiction and making himself a military dictator, above the operation of Constitution and laws,

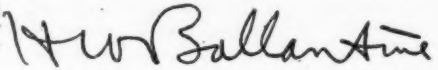
so that he may deal with citizens as if they were alien enemies in hostile territory. State ex rel. Mays v. Brown, 71 W. Va. 519, 77 S. E. 243, Ann. Cas. 1914C, 1, 45 L.R.A.(N.S.) 996; Re Jones, 71 W. Va. 567, 77 S. E. 1029, Ann. Cas. 1914C, 31, 45 L.R.A.(N.S.) 1030, note on continuance of constitutional guaranties during war or insurrection; Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533, L.R.A.1915A, 175. The principle of these decisions is directly in the teeth of Ex parte Milligan, and the reasoning is riddled by the dissenting opinions of Justice Robinson. The doctrines of the West Virginia cases have already been repudiated by the courts of Kentucky and Montana. Franks v. Smith, 142 Ky. 232, 134 S. W. 484, Ann. Cas. 1912D, 319, L.R.A.1915A, 1145; Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, Ann. Cas. 1916A, 1166, L.R.A. 1915B, 988. The West Virginia court translates the maxims, *Salus populi suprema lex* and *Inter armes silent leges*, to the effect that "the highest law is arbitrary power" and that "there are no legal limits upon military authority." There are many, no doubt, who hold to this creed. Except on the actual field of military operations, however, military necessity does not demand the abdication of the supremacy of law.

As was pointed out in the famous case of Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; 2 Hare, Am. Const. Law, chap. 44, when General Jackson attempted to declare martial law in New Orleans during the War of 1812, the Constitution of the United States does not provide that in time of public danger the executive power shall reign supreme. It does not trust into the hands of a dictator the reins of government. The framers of the Constitution were too well aware of the hazards of such a provision, and had they made it, the states would have rejected a constitution stained with such a clause.

The extraordinary authority over alien enemies given the President by the Act of 1798 (U. S. Rev. Stat. § 4067, Comp. Stat. 1913, § 7615), when war is declared, and now being exercised by President Wilson, does not authorize alien enemies to be executed summarily as spies, but only to be removed, arrested, interned, and regulated by executive order as public safety may require. See Lockington v. Smith, Pet. C. C. 466, Fed. Cas. No. 8,448.

As two able English writers have said[2] of the English Defense of the Realm Act of 1914, before it was amended in March, 1915: "Thus, for the first time in England for at least two hundred and fifty years, a civilian may be sentenced to death without trial by jury. Is this justified? Is it necessary? It may be said (and we have said it) that the offense of assisting the enemy is already treason at common law and punishable as such with the death penalty. So it is and so it ought to be. But it is one thing to try a man for an offense *defined* by the common law and by innumerable cases in the law reports and to try him with all the safeguards of a jury and with the right to appeal from their verdict, if it is one of "guilty" to the court of criminal appeals; it is quite another thing to try him for an offense which is not so defined, and to try him by a court of officers ignorant of the common law (indeed they are not bound to take notice of the common law at all), who direct themselves, instead of directing a jury, both as to the law and the facts, and whose verdict and sentence in one are subject to no appeal, but merely to the revision of a ministerial officer,—the Judge Advocate. Considering that the King's courts are still sitting, that the King's writ runs throughout the realm, and that juries can be, and are being, impaneled every day, we think this subjection of the lives of private citizens to military law is entirely unjustified."

[2] War, Its Conduct and Legal Results, by T. Baty and J. H. Morgan, p. 110.



THE FEDERAL FARM LOAN BOARD

Charles E. Lobdell — Herbert Quick — W. W. Flannagan, Sec'y
George W. Norris — Wm. G. McAdoo, Sec'y — W. S. A. Smith

The Federal Farm Loan Board

BY FRANK R. WILSON

of the Federal Farm Loan Bureau (Washington, D. C.).

UPON the adoption of the Federal Farm Loan Act in July, 1916, some discussion arose as to the constitutionality of this legislation. Its constitutionality was questioned by some because, under the act, farm loan bonds issued against first mortgages on farms held by the Federal land banks are declared to be instrumentalities of the government, and exempt from all form of taxation,—national, state, and municipal.

The Secretary of The Treasury recently addressed a communication to the Attorney General of the United States, asking him for an opinion as to the constitutionality of the act.

The Attorney General studied the legislation thoroughly, and recently issued an opinion in which he holds that the declaration by Congress that these bonds are instrumentalities of the government is final, citing many Supreme Court decisions in support of his conclusion.

The concluding statement of the Attorney General's opinion is as follows:

"I do not deem it necessary to analyze the act in detail. It is sufficient to say that the mortgages and farm loan bonds are of the very essence of the system created by it. The original capital of the Federal land banks is to be loaned, through the agency of national farm loan associations, to bona fide cultivators of the soil on first mortgages on farm lands. When a sufficient amount in such mortgages has accumulated, they are to be turned over to a 'registrar' appointed by the Farm Loan Board, and, with the approval of that Board, farm loan bonds are issued by the land bank and sold. With the proceeds further loans are made

on mortgages, which mortgages in their turn become the basis for an additional issue of bonds. This continuous flow and reflow of mortgages and bonds constitutes the prime function of the whole system.

"A tax upon these bonds and mortgages would, therefore, be a tax upon the most important operations of the system, and might hamper it to so great an extent as to render it unsuccessful. In other words, it might be found impossible to raise capital by means of the bonds, and it might be found impossible to loan money on the mortgages at the reasonable rate of interest desired, if these two fundamental instrumentalities were taxed by the states. At any rate, Congress might well think so, and its declaration upon the subject is conclusive.

"I have the honor to advise you, therefore, that, in my opinion, that portion of § 26 exempting the mortgages and bonds from state, municipal, and local taxation is constitutional."

Assuming the constitutionality of the Federal Farm Loan Act, this legislation offers to lawyers enlarged opportunities to serve their communities and their own profession.

The Farm Loan Act was adopted to correct certain weaknesses in our economic system. It was everywhere recognized that the farmer was being made the victim of an unfortunate condition. His business was being unduly taxed for the use of working capital. He was required to pay higher rates of interest than any other business man. There were several reasons for this. The farmer to get any benefit from a mortgage had to have it for a long period, and banks were not in position to make these long-time loans because good business practice required that they keep their assets in liquid and available form. The best commercial bankers were not willing to tie up their deposits in these long-time loans; therefore, the farmer found difficulty in getting necessary capital at a reasonable rate. He was away from the supply of capital; his land titles were not standardized so as to give a feeling of security to investors who had money to lend, and the difficulty of examining the character of the land to be mortgaged added to the barriers which kept the farmer from a needed supply of capital.

So, the Federal Farm Loan Act was adopted. It provides the machinery for assembling a great number of farm mortgages together in twelve Federal land banks. The original capital of those banks amounting to $750,000 each was to be supplied by the government, if private investors did not buy it. The government supplied practically all of this original capital of the twelve Federal land banks, placing at the disposal of these banks, early in 1917, $9,000,000.

These banks are required to limit their loans to not more than twenty times their capital. A bank capitalized at $750,000 is, therefore, enabled to lend $15,000,000 without increasing its capital stock. It gets this supply of money by selling bonds issued against farm mortgages previously taken. As soon as it takes $50,000 of mortgages, it issues bonds against those mortgages and sells them, getting another $50,000, which is immediately loaned.

The farm loan system is thoroughly co-operative; and, since it is for the exclusive use of farmers, it is up to farmers to provide the capital stock necessary to enable it to grow. That means that for every $1,000 which a bank lends, the farmer must put back $\frac{1}{20}$ of that amount, or $50, to provide more capital, so the bank may go on selling its bonds and lend $1,000 to some other farmer.

In a co-operative financial institution such as this, some form of government must be provided. The unit in the farm loan system is the national farm loan association. Farmers are required to organize these farm loan associations in their local communities. Each association must contain at least ten farmers, and must take at least $20,000 of loans. Each farmer who joins this association puts back $\frac{1}{20}$ of the amount he borrows, which is invested in the capital stock of the Federal land bank from which he borrows.

The law provides that each one of these local groups shall have a secretary-treasurer who may be paid for doing this work. It is the business of the secre-

tary to act as the business agent of this local group in all of its relations with the Federal land bank. The loans are made through him; he sends the mortgages to the Federal land bank; he sees that all of the mortgaged improvements are kept insured to the amount of the obligation; he sees that all members of the local association keep their taxes paid; and he is the man who makes the annual collections of the interest and principal from the members of that association and remits these payments to the Federal land bank. He need not be a member of the association nor a borrower. He must give a bond to protect the association for the money in his possession. Under the law he may also accept deposits from these members, and, after the deposit of each member reaches $25, this money must be invested in a farm loan bond of that size. So, this system may be made the farmer's saving bank.

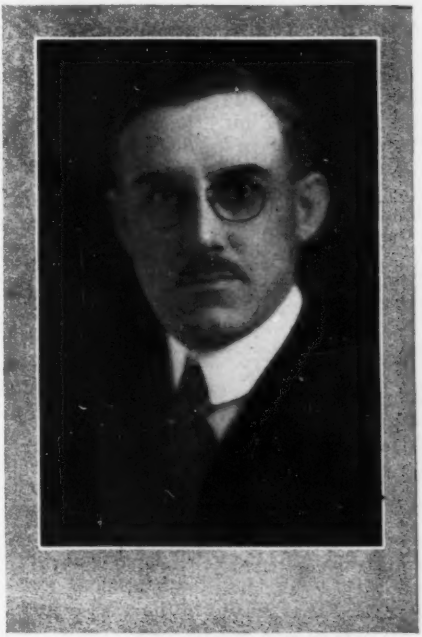


Photo by Harris & Ewing

FRANK R. WILSON

Every farmer who borrows under the Farm Loan Act must provide an abstract of title. The opportunity to get credit at 5 per cent on such long terms and on such favorable terms of repayment means that there will be a great increase in profitable borrowing among farmers. This means a great increase in the business of preparing and inspecting titles, and of course this means more business for the lawyer.

When a farm loan association is organized in your community it means that twenty-five or fifty farmers, as the case may be, will have to have their abstracts brought up to date. It is likely that, since they are borrowing money co-operatively, they will also co-operate to have their legal work done. They are not permitted to use their corporate funds to pay for their individual abstracts of title, but the Federal Farm Loan Board has advised them to co-operate as individuals to have their work done and save some expense. It is worth while for lawyers to study the Farm Loan Act. It does not need argument to show that the refunding of the existing farm mortgage indebtedness of the United States at a rate of 2.4 lower than has heretofore existed means a great increase in the farm-mortgage business. It will pay lawyers to study this act, because it will be the basic law of large financial activities. A body of law is sure to grow up around the Farm Loan Act. For example: under the Farm Loan Act the second mortgage is going to take on new value. A tenant who wants to buy land will be able to borrow 50 per cent of the appraised value of the land and pay that 50 per cent to the original owner. The first mortgage to the Federal land bank is made to run for 36 years, to be repaid in these small semi-annual instalments. The original owner, having received a 50 per cent cash payment, is willing to take a second mortgage for a portion of the other 50 per cent of the purchase price. Let us say the second mortgage is to be retired in ten annual instalments. Unless the tenant has paid a very high price for his land, his payments under this purchase arrangement will not exceed his previous

annual payments for rental. And he will be saving this money by investing it in a permanent home. In some states mortgage companies are being incorporated to deal exclusively in second mortgages given in connection with first mortgages under the Farm Loan Act.

The predominance of lawyers in politics and lawmaking is an indication of their aptitude, by reason of their training, to take the lead in affairs of public interest. Every attorney who will use his influence to get the farmers of his community to make use of the Farm Loan Act will be performing a real service for that community. This service will be better understood when it is explained under what conditions these loans are made and for what purposes.

The Federal Farm Loan Board has established a universal interest rate of 5 per cent on farm mortgages for all parts of the United States. The farmers of the United States have been paying an average rate of 7.4 per cent on a total volume of approximately $4,000,000,000 of loans. Nearly every community in the United States is paying its part of this excessive interest rate. The organization of a farm loan association in your community will enable your farmers to escape the excessive interest rates that prevail, and give them the benefit of this 5 per cent rate. They may make their mortgages run from five to forty years, and these mortgages must be paid off on the amortization plan, which means that they will be retired, principal and interest, by semiannual payments. A $1,000 mortgage at 5 per cent running for thirty-six years may be paid off, interest and principal, by semiannual payments equal to 6 per cent interest alone, under the old system. Under the new system, at the end of the mortgage term, the borrower is out of debt, whereas, under the old system, he pays his 6 per cent or more, and then owes the entire principal at the end of the period.

The Farm Loan Act is bound to have a beneficial effect on the agriculture of any community, and indirectly upon the business of every village or city. This money may be used for the purchase of land, for the purchase of additional land, for the purchase of live stock, drainage, clearing, fencing, needed buildings, needed machinery, or anything that will facilitate the cultivation of the land or add to its productivity. Loans are limited to $10,000 to prevent land monopoly. Loans are limited to actual farmers to prevent speculation. In fact, every influence of the Farm Loan Act is toward a higher standard of agriculture. Its high purpose is one that ought to appeal to the patriotism of every lawyer as well as to his sense of business.

The Farmer's Opportunity

Agriculture in this great crisis is to become the important factor. The farmers of America should be encouraged in every possible way, both by the State and by the Nation. Not only should they be encouraged, but they should be helped where help is needed. Seed will be needed in many places, fertilizer will have to be supplied, and in many instances it may be necessary in some manner to furnish the farmer with funds to the end that he may be supplied with feed, farm implements, and other things absolutely necessary to enable him to raise a crop.

It may be necessary to send recruits to the farm from the cities. Some are advocating that.

Let us remember and take heed of this fact, that in this great State-wide, Nation-wide effort for increased production the trained and experienced farmers of America must be made the commanding officers in the great army of food supply if victory is to crown our efforts.—Hon. Thomas L. Rubey.

Trial of Aaron Burr

BY HON. PETER W. MELDRIM

*of the Savannah (Ga.) Bar; Former President of the American Bar Association.**

IN THE graveyard at Princeton there is a simple marble slab bearing the words and figures: Aaron Burr, Born February 6, 1756, Died September 14, 1836. A Colonel in the Army of the Revolution, Vice President of the United States from 1801 to 1805.

Beneath this stone lie the mortal remains of one of the most remarkable actors who ever played a part in the drama of American public life. I hardly know why I should have selected Aaron Burr as the subject of this paper, unless it be that, as soldier and politician he represented that type of the American lawyer that is rapidly passing away. Those men have always had for me no little interest, and it seemed to me that a sketch of Burr might not prove altogether uninteresting to you. There has been so much written concerning Burr, both in history and romance, that I cannot hope to add anything to the sum of your information; but I may possibly deduce from the evidence that has been introduced conclusions foreign to the work of the historian. In dealing with the subject, I am not aware of any bias or prejudice, and I have endeavored to reach my conclusions with judicial fairness.

Burr had every advantage that heredity, environment, or education could give. His father was the distinguished president of the College of New Jersey; his mother, the beautiful, pious, intellectual, and accomplished daughter of Jonathan Edwards, the foremost scholar and thinker of his day. In person, Burr was below rather than above middle height, but he bore himself as a soldier. Classic was his pose of the head, and his eyes were those of the eagle. His apparel befitted the man, and his very bearing showed that he not only respected himself, but that he demanded like respect should be shown to him by others. His habits were abstemious, and his physical endurance unlimited. His intellect was keen and penetrating. He saw things just as they were. So marvelous was the acuteness of his mind that he was pre-

Photo by R. H. Rose & Son, Princeton, N. J.
GRAVE OF AARON BURR AT PRINCETON, N. J.

*Address delivered before the Alabama State Bar Association.

pared to enter college at the age of eleven, and he was graduated at sixteen. The highest development of intellect is to be found in the power of organization. The efforts of individuals are puny, but individual efforts when combined become an irresistible force. It was this power of combination and organization that made Burr, at one time, the strongest personal force in American politics. His power was not due to a long line of great scholars, as John Adams thought, nor to the low arts of the politician, as Hamilton charged, nor to his fame as a soldier, as Jefferson suggested, but it was due to his power of organization.

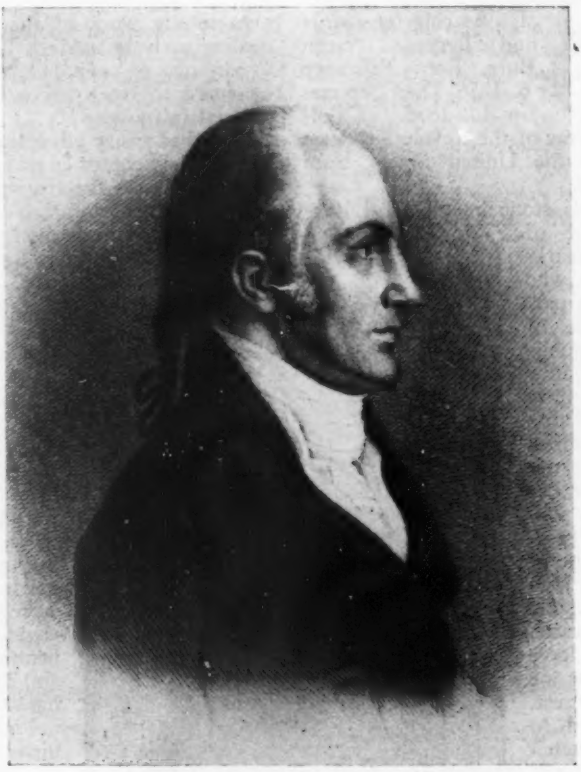


Photo by Boston Photo News Co., Boston, Mass.
AARON BURR

Added to mental endowments of the very highest order, he was proud, dignified, and yet courteous, and there was about him "that vague, subtle, undefined, and indefinable" something that comes only from good breeding and that marks the gentleman. Conscious of his intellectual superiority, and assured of his high social standing, it was natural that he should have possessed in large degree that self-confidence which was never shaken, and which never forsook him. He believed in himself, and no man ever yet climbed the heights who did not believe in himself. His confidence in himself, his abiding faith in his ability to overcome all obstacles, to meet all difficulties, to successfully combat all dangers, developed fortitude,—the power to withstand not only physical pain and suffering, but the "slings and arrows of outrageous fortune." Whatever may be said against Aaron Burr, it can never be truthfully said that from the fateful day when he bore the dead body of Montgomery, amid snow and ice, from the line of fire, to those sad days when an exile, in want, yes, in absolute destitution, he had left but two ha'-pence, that he did not bear himself with unfaltering courage and unfailing fortitude. It has been objected that Burr was immoral; but that passionate love which frequently finds its highest development in the strongest natures affords no sufficient cause for the odium that has been heaped upon him. The classics tell us that Mars loved Venus, and all the world knows that Pericles loved Aspasia; Antony, Cleopatra; and Nelson, Lady Hamilton. But the great love of Burr's life was for his good wife, to whom he was ever loyal, devoted, and true, of

whom he never spoke save in terms of sincerest affection and highest respect; his home was one where poetry and philosophy walked hand in hand, where love dwelt and grace abided, where culture and refinement filled the air like the perfume of flowers. The foremost men of this and other lands were his guests, and Burr was the honored host of Richmond Hill.

It is not of the private life of Burr that I should speak, but of him as soldier, lawyer, and statesman. He was naturally the soldier, and while he succeeded at the bar, he did so largely by the employment of the very powers that would have made him one of the greatest soldiers of all times. Military success was the goal of his ambition. He was a student of the science of war. His intellect, his heart, his soul, his very being, were all devoted to winning a soldier's fame. Every effort was made by devoted friends to deter him from engaging in the perilous and arduous march with Arnold to Quebec. How he bore himself in that campaign is a part of the country's history. At twenty-two he was a colonel, having an independent command, and so organizing his force as to convert raw and mutinous troops into an efficient corps, that not only maintained discipline, but that admired and revered its commander.

Burr, amid all the vicissitudes of fortune, never lost the respect of the men who served with him. The fame that Burr won as a soldier has been forgotten in his larger political life, and to understand that life we must pause a moment and consider the situation as it existed at the close of the Revolution. One of the ablest thinkers of to-day, Hon. James Bryce, in speaking of political parties in this country, says: "The history of party begins with the constitutional convention of 1787 at Philadelphia. Two opposing tendencies were revealed: one to maintain both the freedom of the individual citizen and the independence in legislation, in administration, in jurisdiction, indeed, in everything except foreign policy, and national defense of the several states, and the other to subordinate the states to the nation and vest large powers in the central Federal authority."

Out of these tendencies grew the Federal and Republican parties. We can well understand how a strong man might have declined to align himself with either party. The Federalists with their English monarchical tendency were as objectionable as the Republicans, who were disposed to adopt the extreme views of the French democracy. Burr certainly was not a Federalist, and yet he was not a Republican, for he appears to have held himself aloof from both great parties, organizing a political force over which he should hold personal and supreme command. This formation Hamilton called "Burr's Myrmidons," Theodosia called it "10th Legion." True to military nature, he so perfected his organization that it resulted in the defeat of General Schuyler for the Senate. Burr was elected in his place, and that election was the real cause of the duel with Hamilton.

The Schuyler family evercised a commanding influence over the politics of New York. Hamilton had allied himself with that powerful, influential, and wealthy family. He was the son-in-law of Schuyler. The defeat of Schuyler by Burr was the defeat of Hamilton,—he resented it, and never forgave it, never forgot it. It is not necessary to quote the language used by Hamilton concerning Burr. It is sufficient to know that it was insulting. Burr demanded a retraction, Hamilton evaded. I do not mean to say that Hamilton was not a man of high courage, but he had to do one of two things, either to retract or fight. The long correspondence that ensued between these two men was intended, on the part of Burr, to force a retraction; on the part of Hamilton to avoid making it. Finally, the issue was reached, the retraction was refused, the duel followed, and Hamilton fell. Instantly, Hamilton became a martyr, and Burr a felon. The intensity of feeling against Burr was due to the fact that Hamilton was the head of a great party, nay more, was the idol of that party, and had fallen in defense of his party. Burr was denounced by the Federalists, and was not supported by

the Republicans. Had it been Jefferson who had killed Hamilton, and not Burr, Jefferson would have been condemned by the Federalists, but he would have had the support of the Republicans. As it was, Burr had the support of neither party. The Federalists hated him, and the Republicans mistrusted him. The duel in itself afforded no justification for the treatment Burr received. Duelling was then, and continued to be for more than fifty years after, an honored and honorable method of settling certain matters between gentlemen. In England, men like Pitt and Wellington, Grattan and Fox, Sheridan and D'Israeli, had fought. In France, Lamartine and Thiers had gone on the field. In this country, Randolph, Clay, Jackson, Decatur, Yancey, and scores of men, had sought to wash out insult with blood. No loss of reputation came to these men. It has never been suggested that the Burr-Hamilton duel was in the slightest degree unfair. It is conceded that the provocation was great. It cannot be contended that Burr should have submitted to the constant reflections that Hamilton was casting upon him. If these reflections were just, then Hamilton should have avouched them. If they were unjust, then he should have withdrawn them. As it was, he did neither. Hamilton cordially disliked Burr, and, having no confidence in him, doubtless had expressed a low opinion of him. Burr had stood this treatment, at the hands of Hamilton, as long as he intended to stand it, and there is no doubt that his determined purpose was to force a fight, or to have a general and unqualified retraction. Hamilton could not truthfully make the retraction, and, therefore, he did not make it. What he could have done was to have avouched his low opinion of Burr, and to have declared that he had so expressed himself on various occasions. He then could have declined, or have accepted, a challenge from Burr, as he deemed proper; but he accepted the challenge for the reason that he did not have enough moral courage to face a public opinion which demanded that one who was aggrieved had the right to that satisfaction which, at that time, was common among gentlemen. It is not my intention to discuss the Code Duello; but, I might be permitted to remark that if there were a stricter personal responsibility for words, spoken or written, that reflect on a man's honor, or a woman's virtue, private and public character would be more respected, and politeness and courtesy would be more observed.

Growing out of the death of Hamilton, two indictments were found against Burr, one in New York, and the other in New Jersey. Leaving his home, he made his way to Georgia, and thence to South Carolina, when, after spending a brief time with his beautiful, accomplished, and ill-fated daughter, Theodosia, he proceeded to Washington to preside over the Senate of the United States. His impartiality, dignity, and ability won the respect of that august body. He retired at the expiration of his term as Vice President. His public life had ended. What was he to do? Where was he to go? He could not return to New York, for an indictment for murder hung over him there, and the offense was not bailable. His home had been taken from him and sold to satisfy his debts. His law practice was gone. But the indomitable courage of the man was as strong and the fires of his ambition as fierce as when he sought glory on the heights of Quebec. Naturally he turned to the then frontier, and this leads to the interesting question: What was the real object of Burr's alleged conspiracy?

The limits of this paper will not permit a review of the testimony introduced on his trial for treason, and it is only fair to say that since that trial additional documentary evidence has been discovered. From an analysis of all the evidence we can conclude, with reasonable certainty, the real object Burr sought to accomplish. There are three conclusions that the evidence tends to sustain: That he intended to found a peaceful colony on the Washita lands, or to erect a new Confederacy, or to invade Mexico. I do not think that the sole object of the acquisition by him of a large body of land on the Washita, was to establish a peaceful and industrious colony. Burr was not a man of peace,

but of war. The simplicity of rural life did not attract him. Money, except as means to an end, was not an object to him. The useful arts did not appeal to him. These lands were intended to subserve two purposes: one to screen his movements, and the other to provide a rendezvous, and, if need be, a safe place to which he could retreat in the event of repulse. How valuable for the purpose of the invasion of Mexico such an acquisition was finds its best demonstration in the fact that, years afterwards, Austin's colony, planned on substantially the same lines as Burr's, was a most efficient agency in wresting Texas from Mexico. From a strategic point of view, these lands were a military necessity. Burr doubtless held out to the world that his purpose in acquiring these lands was to establish a colony. There was no good reason why these lands could not have been useful in peace as in war. The two uses to which the property could be applied were entirely consistent. The very supplies necessary for the colonists could serve as rations for an army, and the colonist of to-day could easily become the soldier of to-morrow. Hence, we reach the conclusion that the founding of a peaceful colony was not Burr's real object. Was it Burr's purpose to erect a new confederacy? It was alleged that his design was to form Kentucky, Tennessee, Ohio, Indiana, the Louisianas, and the Floridas into one independent government. There is evidence tending to sustain this conclusion, but it is far from being sufficient to convince. The strongest moral evidence tending to convict Burr of a treasonable intent is to be found in the man himself. He had endured hardships, periled life, and had lost health and fortune in the service of his country. He had been indicted for murder both in the state of his nativity and in that of his adoption. He had seen, in his exile, his beautiful home sacrificed. He heard Washington refuse him an appointment abroad. He saw Jefferson regard him as his rival, and charge him with having, through intrigue, sought to become president. Strong, indeed, was the provocation to drive Burr into a desperate enterprise, even into a separation of the Union.

I shall not enter into any discussion of the right of the people of a free, independent and sovereign state, in a duly constituted convention, to withdraw from the Federal Union. And I shall not discuss how far a citizen owing paramount allegiance to his state may be guilty of treason by taking up arms in defense of his state; for the determination of neither of these questions is essential to the proposition which I now seek to demonstrate; *viz.*, that it was not the purpose of Burr to erect a confederacy separate from the United States. I am not regardless of the fact that Burr again and again, both by himself and his accredited agents, sought to impress the English and Spanish ministers with the conviction that his purpose was to organize a separate government west of the Alleghenies. Burr's enterprise was a desperate one. He was an ambitious soldier of fortune. Northward and back of him were defeat and odium. Southward and ahead of him were victory and glory. Victory and glory could only come by force of arms. War was necessary to accomplish his purpose, but the sinews of war were wanting. Could he obtain from England or Spain the necessary funds, the result was assured, for thousands of hardy adventurers were ready to follow his standard until he planted it in the halls of the Montezumas. To expose his real design would have been to put Spain on her guard, and to have endangered his success. Spain was at peace with this country, and for Burr to have openly declared that he intended to invade, with an armed force, the territory of a friendly power, would have rendered him liable to arrest, indictment, trial, and conviction of a high misdemeanor. It was immaterial to Burr from what source the money came, so long as he obtained it. If England or Spain had paid it on Burr's representation that he intended to use it in an effort to destroy the autonomy of the United States, neither England nor Spain would have admitted that it had been given for such a purpose. That it was immaterial to Burr where he got the money is best shown by the fact that he had the audacity to say to Merry, the English Minister, that if England declined his pro-

posal, he would have recourse to France. It can safely be concluded that Burr's efforts to obtain money, by false pretenses, from England and Spain, do not show an intent on his part to establish a separate confederacy. War with Spain was regarded as a certainty. The Spaniards had crossed the Sabine. Wilkinson had received orders to expel them. A body of troops under Burr would have been an efficient aid in a war with Spain. Doubtless, the strained relations with Spain and the apparent certainty of war with that power suggested to Burr that the time was auspicious for his adventure. Daring spirits were ready to unite with him, just as we find them a few years later following Lopez to Cuba and Walker to Nicaragua. But the Spanish general Herrera having withdrawn his troops, and peace having been concluded, Burr found himself with only two boats ready to descend the Cumberland. Taking these with a few men, he met Blennerhassett with four boats at the mouth of the river. At the Falls of the Ohio, Floyd, of Indiana, joined the party, so that there were then nine bateaux and less than sixty men, with their personal arms, a few horses, provisions, and agricultural implements. This was all of Burr's expedition. How pitiful and insignificant it was. It passes understanding how Mr. Jefferson and the mass of the people of the United States should have lost all just sense of proportion, and have gone wild over this expedition of Burr.

No one appears to have been more surprised than was Burr himself at the excitement which he had aroused. Articles most sensational appeared in the press, proclamations, Federal and territorial, were issued, and troops, regular and militia, were under arms, marching to meet him. Disclaiming all treasonable intent, he submitted himself to the civil authority of the Mississippi territory, and the grand jury at Washington found "no bill" against him. It may be urged that Burr's flight at this time was an evidence of his guilt. It will be remembered, that Burr insisted that the grand jury of the Mississippi territory should not be discharged, notwithstanding the motion to that effect by the United States district attorney, but that it should make full inquiry as to his conduct. Such inquiry was made, and the jury returned its finding in these words: "On a due investigation brought before them, are of opinion that Aaron Burr has not been guilty of any crime or misdemeanor against the laws of the United States, or of this their territory, or given any just occasion for alarm or inquietude to the good people of this territory." Upon this finding, Burr demanded a discharge. The demand was refused. Mead, acting governor, wrote on January 26, 1807, to Dearborn, then Secretary of War, that Burr "has given bail before Judge Rodney in the sum of $10,000 for his appearance at court to be held on the first Monday in February." Williams, who was governor of the territory, in February, issued his proclamation, reciting that Burr's recognizance was "to answer bills of indictment that might be found against him, and to continue to appear from day to day until dismissed by said court." It would seem as if there were no sufficient legal reason why Burr should not have been discharged. The term "from day to day" must have a reasonable construction. Burr, when he surrendered to the civil authority of the Mississippi territory, was on the western side of the Mississippi, and out of the jurisdiction of the territory. Shields, the trusted aid to Acting Governor Mead, and who represented the governor in the interview with Burr preceding his surrender, declared in writing, "that Colonel Burr unhesitatingly expressed a temper voluntarily to submit his conduct to judicial inquiry, that he appeared solicitous to embrace the first safe occasion to do so, and in fact had the day before made arrangements with Colonel Fitzpatrick, of the 2d regiment, to that effect." The refusal of this territorial judge to discharge Burr was most significant, and we have not far to search for the reason of it. General Wilkinson in New Orleans had sent at various times Colonel McKee and three officers in disguise, as well as Dr. Carmichael, Lieutenant Peter, Lieutenant Jones, and Captain Shaw, of the Navy, to capture Burr. This was the same Wilkinson who on December 15,

1806, urged upon Governor Claiborne that the seamen "should be shipped to resist the attack of Aaron Burr and his lawless banditti."

"Banditti," consisting, according to the military report of Woolridge, Lieut.-Col. Comdg., of "four flat-bottom boats and five barges filled principally with provisions. I did not see one stand of arms, and Colonel Tiller informed me that they had none. I saw about fifty-five or sixty men, some women and children, and a few negroes." This was the same Wilkinson who on December 16, 1806, wrote to Claiborne, "Alexander must be taken up, indeed he must,—he said publicly at the coffee house the other night that if Burr was a traitor, I was one also." This was the same Wilkinson who urged the suspension of the writ of habeas corpus, and the placing of New Orleans under martial law. The same Wilkinson who, without lawful warrant, caused the arrest of men like General Adair, dragging Adair from table while at dinner, parading him through the streets, and hurrying him away by sea on the charge of being an accomplice of Burr. This was the same Wilkinson of whom Governor Meade wrote to Governor Claiborne on December 14, 1806, in these words: "Be on your guard against the wily general, he is not much better than Catiline, consider him a traitor, and act as if certain thereof. You may save yourself by it." This was the same Wilkinson who was the chief prosecuting witness against Burr for treason in the trial at Richmond.

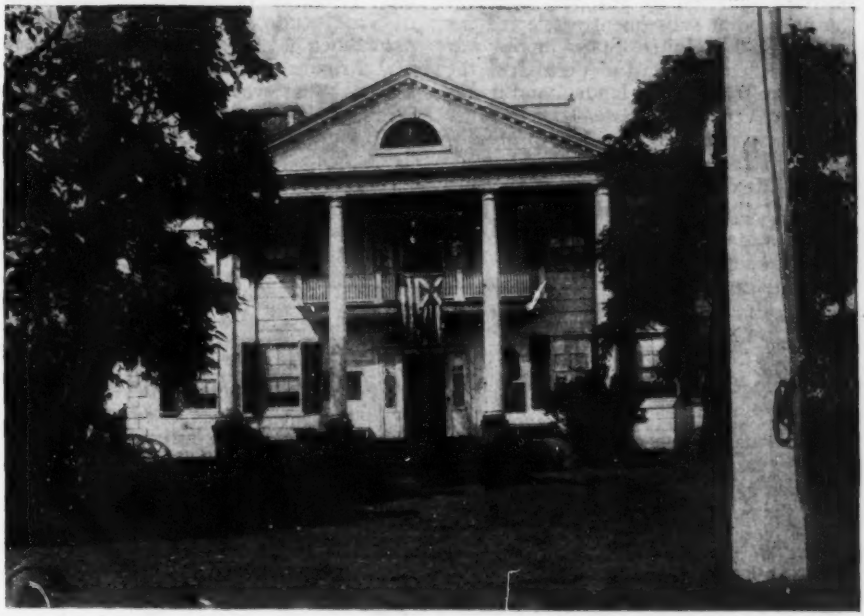
These were the circumstances that surrounded his flight. At this time Burr was a guest of Colonel Osmun, and near by lived Major Guion. These gentlemen had been officers in the Revolution. Osmun had belonged to the New Jersey line. He was an intimate friend of Burr, and these two soldiers, stern and true, with the fullest confidence in the integrity of Burr, advised his flight. Osmun gave him a horse, and the heavy-hearted Burr rode out into the night. With a price set upon his head he was soon captured, and we next find him at Richmond, indicted for treason. Burr had been previously accused, in the Federal court at Frankfort, with setting on foot an expedition against Mexico. He had appeared and demanded examination. The government was not ready, and Burr was discharged. Again, in the Kentucky district, the United States district attorney presented an indictment charging that Burr had set on foot a military expedition against the dominions of the King of Spain. The grand jury found "no bill." But the prosecution that he was now to face was the fourth that the United States had brought against him. With that trial every well-informed American is familiar. Interesting as was the prisoner at the bar, interesting as was the devoted and beautiful Theodosia, who like an angel guarded him, interesting as were the men who had gathered there, Washington Irving from his home on the Hudson, Andrew Jackson from the Hermitage, John Randolph from Roanoke; interesting as was the brilliant array at the bar, Rodney, Hay, McRae, and Wirt for the prosecution, Baker, Lee, Botts, Wickham, Edmund Randolph, and Luther Martin for the defense; interesting as was the great Chief Justice, in the strength of his physical and intellectual manhood, learned, able, calm, and courageous; interesting as was the important legal question as to the right of a prisoner before indictment to challenge a grand juror; interesting as was the momentous principle decided that there can be no treason against the United States without proof of an overt act,—yet, to me the case was most interesting, not for these reasons, but because a great judge did his duty as he saw it, notwithstanding the wrongful abuse of executive power in seeking to control the decision of the court for the furtherance of personal and political ends. Jefferson sought the conviction of Burr, for he wrote to Langdon on December 22d, 1806, referring to Burr, "But neither am I certain that the halter will get its due." He instructed Hay, the district attorney, "to pardon all the accused, provided the principal might be convicted." He sent to Hay on May 20, 1807, blank pardons to be filled at Hay's discretion. He inclosed to Hay a pardon for Bollman, who refused to accept it, a pardon for a man who had neither pleaded guilty, nor had been convicted.

He spared neither time nor money to convict, while printed circulars appealed for witnesses, and secret agents searched in every quarter. Jefferson, enraged at the acquittal of Burr, exclaimed: "In what terms of decency can we speak of this?" He charged Marshall with being guilty of tricks to force the trial before it was possible to collect evidence. He declared that "the nation will judge both the offender and the judges for themselves." He had prejudged Burr, asserting that "of his guilt there can be no doubt."

On September 4, 1807, Jefferson wrote to Hay these angry, undignified, unjust, and ignoble words: "The event has been what was evidently intended from the beginning of the trial; that is to say, not only to clear Burr, but to prevent the evidence from ever going before the world." In a word, Mr. Jefferson so far forgot himself as to charge the Chief Justice not only with having wrongfully and purposely acquitted Burr, but that he, in addition, had completely suppressed the evidence. He adds in the same letter, referring to the charge against Burr for a misdemeanor: "If he is convicted of the misdemeanor, the judge must in decency give us respite by some short confinement of him, but we must expect it to be very short." Here was the President, through the district attorney, attempting to dictate to the presiding judge the sentence to be imposed. It must be one to degrade Burr. Is it to be wondered at that Mr. District Attorney Hay, in an argument before the court in which he sought to intimidate the Chief Justice, insinuated that Chase had been impeached, because he had sought "to wrest a verdict from the jury and prejudge the case before hearing all the evidence in it?" I know nothing finer in the literature of the law than the reply of the Chief Justice when he calmly said: "That this court does not usurp power is most true; that this court does not shrink from its duty is not less true."

This has not been the only time in the history of the country when a Chief Executive has sought to control judicial decision. The Republic can stand against foreign invasion and quell insurrection; it can restrain the aggressions of capital, and protect itself against the excesses of labor, but it will fail the moment that the judiciary becomes flattered by the smile, or intimidated by the frown, of power. Reprehensible as was the conduct of Mr. Jefferson to the prisoner at the bar, more reprehensible was his criticism of the judge presiding; most reprehensible was his abominable proposition made to the district attorney on June 19, 1807, "to commit Luther Martin as *particeps criminis* with Burr." Martin was a great lawyer. His arguments in the constitutional convention had stamped him as possibly the greatest thinker in that body of great men. He was the leading counsel for Burr. His mind was a veritable storehouse of knowledge, and before his argument the flowers of Wirt's rhetoric wilted, faded, and fell. It was this lawyer whom Jefferson sought to commit, a lawyer charged with the defense of human life, nay, charged with what was more important than the life of an individual, the duty of aiding in the determination of a great principle which should serve for all time to guide the nation. This effort to deprive the accused of the benefit of counsel was as outrageous as it was audacious. Language is too poor to express the horror which every lawyer, which every fair-minded man, must feel at this proposition of Mr. Jefferson. The property, lives, rights, and honor of our people will be safe, and civil and religious liberty will be held sacred, as long as we have an able, upright, and courageous judiciary, and a free, fearless, and outspoken bar. But if bench or bar is controlled by power, the rights of persons will cease, and constitutional government will perish.

The trial of Burr ended, as is well known, in his acquittal. I had intended to review the newly discovered evidence bearing upon the charge of treason against him, but I fear such a review would be tiresome, and I doubt if I could condense it into the proper limits of this paper. It should not be forgotten that after Burr's acquittal, the district attorney moved to send Burr to the Mississippi territory for trial and thence to Ohio. On this motion all the evidence of the prosecution was introduced. The



THE JUMEL MANSION, NEW YORK

The Home of Mme. Jumel whom Aaron Burr Married in 1833.

real object of the motion was to compel an amendment to the Constitution curtailing the power of the judiciary. On this motion there was no restriction as to the introduction of evidence. When the hearing was concluded, Chief Justice Marshall said: "Weighing the whole of this testimony, it appears to me to predominate in favor of the opinion that the enterprise was really against Mexico."

The Chief Justice concluded by committing "Aaron Burr and Harman Blennerhassett for preparing and providing the means for a military expedition against the territories of a foreign power with whom the United States were at peace."

The decision of the court was right upon the facts. The object of Burr was the invasion of Mexico, and it is interesting to note that while Burr's plans miscarried, and his name became execrated, yet time has vindicated the wisdom of those plans, and the sober sense of the American people is restoring the name of Aaron Burr to the country's roll of honor. It will be remembered that he sought to induce foreign powers to aid in the invasion of Mexico. At a later period, they did invade that country and placed the unfortunate Maximilian on the throne. Burr sought to establish a military colony on the Washita, intending to use it as a base of operations against Mexico. Later Austin established his colony, and it played a conspicuous part in securing the independence of Texas. Burr had enlisted the support of the Bishop of New Orleans, and the mother superior of the convent of Ursuline nuns, in that city, and three Jesuits were acting as agents for the revolutionists. At a later period the Catholic priest Hidalgo, summoning to his aid the same mighty influence, wrested Mexico from Spain. Burr's plan of invasion of Mexico contemplated Vera Cruz as the objective

point of invasion by sea, and this was the very point subsequently selected for attack by the United States in its war with Mexico. It was at Vera Cruz the American troops were landed, and it was along the very road marked out by Burr on his map that they marched to Mexico City. In 1836 Texas became independent of Mexico. That very year Burr died, but the cry, "Remember the Alamo," rising above the bloody battle field of San Jacinto, was heard by the dying man, when he exclaimed, "There, you see I was right. I was only thirty years too soon. What was treason in me thirty years ago is patriotism now."

Of Burr it may well be said:

> The good men do is oft interred with their bones,
> The evil lives after them.

Kerenski, Russia's New Minister of Justice

As earthquate often causes tidal wave
More devastating than the shock, more grave,
So Russia's revolution shook the floors
Of all the ancient prisons, and the doors
Sent forth a wave of fury, long subdued,
Which, in its new-found liberty, renewed
Its life and wrath; it gathered from the strand
The flotsam and the jetsam of the land,
And, with this human drift, increased amain
Until it threatened Freedom's new-born reign.
The Reign of Terror drenched poor France in blood,
But Russia was by grace spared such a flood;
For when the mob had reached the great Duma,
The Minister of Justice and of Law
Opposed their dark designs with reason's light,
And turned their mighty forces t'ward the right;
The blood of those by whom they'd been betrayed
They called for; but his words their fury stayed:
"O Citizens of Russia, now is gone
"The Tyranny of Czar. Let us not wrong
"Blind Justice. But let us ordain at last
"The rule of law we longed for in the past.
"Your Minister of Justice gives his word
"That none shall suffer before he is heard;
"But when his guilt is found in open court
"The stay of execution shall be short."
O Russia, it was well for thee that hour
That thou didst have a Minister in power
Who had a patriot's courage, and whose word
Was wise and good with all by whom 'twas heard;
For when the mob is rising like the tide
It is not often stopped nor turned aside.
Thy title thou hast well exemplified,
O Minister of Justice, and, when tried,
Thy acts the lawyer's mission have expressed:
To stand between oppressor and oppressed,
And stand unchanging when conditions change
And hold above the mob the law's fair name.
With thy true justice as its corner stone
New Russia is, and will be, freemen's home.

Robert Nugen Wilkin,
New Philadelphia, Ohio.

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General Denial in Replevin

BY HON. A. L. SQUIRE

of the Arnett (Oklahoma) Bar

Former County Judge of Ellis County

HIS article is not written for the purpose of advocating a theory, but to call attention to some facts and let these facts have such weight as they are entitled to in determining what is proper court procedure. The facts I refer to are not new or unusual, but they do not seem to have been much considered in the light in which I wish to present them. It is not my purpose to cite authorities except in so far as their consideration will aid in understanding the points suggested.

At a recent term of our district court, on a docket crowded with cases, many of which had extensive pleadings and many delays caused by motions and demurrers and the resulting necessity for time to perfect pleadings, were several cases which attracted my attention because of their simplicity of pleading and the promptness with which they were disposed of.

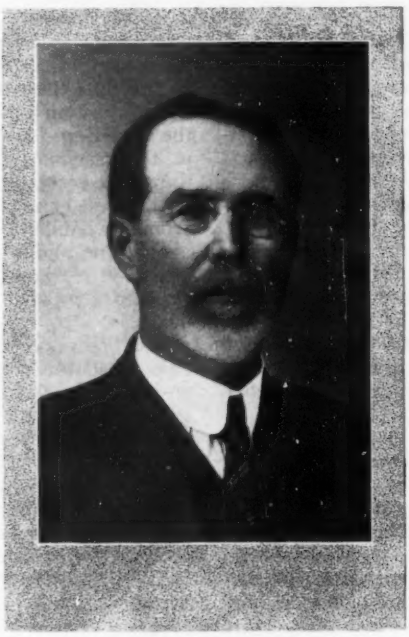
One of these cases was labeled "Replevin." The facts, in brief, were as follows: A foreign corporation having machinery to sell sent a traveling salesman into this territory to sell its goods. Two men, as partners, made a written order for a steam engine, a threshing machine, and a corn sheller. The sale was made on time. The machines were delivered, several notes aggregating, say, $3,300, were given as evidence of the indebtedness thus created, and a chattel mortgage on the machines and other personal property was given to secure the notes. The purchasers made several payments, defaulted as to the balance, and then refused, after due demand, to turn over the mortgaged property. In the meantime the agents of the company had visited the purchasers and repaired the machines several times, and the purchasers, at the time the machines were repaired, had signed an instrument agreeing that the repairing done had cured all defects in the machines and made them what they were recommended to be at the time of the sale, and releasing the company from any liability for defects. The notes, before due and for a valuable consideration, were transferred to the plaintiffs, another company in the same line of business.

The holders of the notes had two remedies to choose between. They could sue on the notes and ask to have the chattel mortgage foreclosed by proper court procedure, or they could replevin, and, if successful in that action, give notice as required by law, sell the property at public auction, and apply the proceeds to liquidate the debt. They elected to replevin the property.

The plaintiffs' petition alleged the existence of the debt, the execution of the notes as evidence thereof, the execution of the mortgage to secure the payment of the notes, the transfer of the notes to the plaintiffs before maturity and for a valid consideration and without knowledge on the part of plaintiffs of any infirmity, that plaintiffs were holders in due course, the default in payment by the purchasers when there was still $2,000 of principal and several years' interest unpaid, plaintiffs' special ownership in the mortgaged property by reason of these facts, and the right of the plaintiffs to the possession of the property for the purpose of foreclosure. The defendants answered by general denial. The only pleadings on which the case was tried were the plaintiffs' petition and the defendants' general denial.

In the evidence the plaintiffs admitted the purchase of the machinery from the traveling salesman, making the written

order, receiving the machinery, executing the notes and mortgage, making partial payments during the first two years after receiving the machinery; that after using the machines one year they signed the instrument, which was an acknowledgment that the machines were all right, and releasing the company from liability for defects; and that more than half of the purchase price was still unpaid. But they sought to prove that there was both want and failure of consideration, that there had been a written warranty for part of the machines, which had been lost, and verbal warranties for the balance, and that these warranties had been breached, and that they had been induced by fraud to sign the instrument containing the release, and that plaintiffs were not innocent purchasers. Evidence to prove all of these defences was admitted under the general denial, but over the plaintiffs' objection, and this practice is fully sustained by the decisions of the supreme court of Oklahoma and a great majority of the other jurisdictions of the United States.[1] Special interrogatories were submitted to the jury, and the jury found the issues, as suggested by the evidence, for the defendants, and on these findings the court rendered a general judgment for the defendants.



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The real issue in this case was: Had there been such fraud, want or failure of consideration, or warranties and breach thereof, as to vitiate the contract contained in the notes and mortgage, and to nullify the conditional transfer of the property by the mortgage? Such facts were not alleged in the pleadings, but defendants were allowed to prove them without giving notice, in their answer, of their intention to do so. In form the issue purported to be, and in one sense was, the right to possession of the mortgaged property, and the question as to the subsistence of the debt was only incidental or collateral to the main issue. If plaintiffs had sued directly on the notes, and asked to have the mortgage foreclosed by court proceedings, then the form of the action would have presented the existence of the debt as the main issue, and the foreclosure as only incidental or collateral. But in fact the real issue in either of the forms of action was and would have been whether or not the notes represented a valid subsisting indebtedness, and the same evidence would have been used in either case.

But if the suit had been directly on the notes, the pleadings would have been

[1] Robinson v. Peru Plow & Wheel Co. 1 Okla. 140, 31 Pac. 988; McFadyen v. Masters, 8 Okla. 174, 56 Pac. 1059, 11 Okla. 16, 66 Pac. 284; Payne v. McCormick Harvesting Mach. Co. 11 Okla. 318, 66 Pac. 287; First Nat. Bank v. Barbour, 21 Okla. 237, 95 Pac. 790; Francis v. Guaranty State Bank, 44 Okla. 446, 145 Pac. 324; Vallancey v. Hunt, 20 N. D. 576, 129 N. W. 455, 34 L.R.A.(N.S.) 473; Street v. Morgan, 64 Kan. 85, 67 Pac. 448; Gila Valley G. & N. R. Co. v. Gila County, 8 Ariz. 292, 71 Pac. 913; 34 Cyc. 1476; Cobbey, Replevin, § 751 and following sections.

Contra, see Coos Bay, R. & E. R. & Nav. Co. v. Siglin, 26 Or. 387, 38 Pac. 192, and cases there cited. Vallancey v. Hunt, 20 N. D. 576, 129 N. W. 455, 34 L.R.A.(N.S.) 473.

materially different. In that case, the defendants, before they would have been allowed to introduce the evidence they did introduce, would have been required to specifically allege the facts constituting the fraud, the facts showing the warranties and breach thereof, and the facts showing the want or failure of consideration. The case would then have been tried, if the facts had been properly pleaded, with the same evidence and with the same result as was had in the replevin case under the general denial. The plaintiffs had the right to select the form of action they would bring. In the form they selected the answer required was so simple that an office clerk, with the use of a form book, could have prepared it. But had they elected to bring the other form of action, the answer would have required considerable particularity of allegation, and none but a skilled lawyer could hope to prepare one that would withstand the attacks of motions and demurrers and admit all of the evidence that was admitted in the replevin case under the general denial.

Why should there be such a wide difference between the pleadings required in the two forms of action to admit the same evidence and produce the same result? In Woodbridge Bros. v. De Witt,[2] the Nebraska supreme court, in speaking of replevin, said:

"This action is not controlled by the ordinary rules of pleading."

In First Nat. Bank v. Barbour, 21 Okla. 237, 95 Pac. 790, the Oklahoma supreme court used the following language:

"The cases cited by learned counsel for appellant, to the effect that payment and other matter going to defeat the note was new matter, which should come from the defendant and be pleaded in order to make it admissible, are not in point in this kind of a case. This rule prevails in all the Code states with which we are familiar. Payment, accord and satisfaction, and other such defenses to suits on promissory notes, suits on accounts and kindred cases, cannot be proved under a general denial in other Code states any more than they can in Arkansas;[3] yet such defenses may be proved in replevin cases, where the gist of the action is merely the right to possession of personal property."

Other statements of similar import are to be found in the opinions of courts and text-writers, and our entire replevin practice seems to be based upon the idea that the rules of pleading in replevin are different from the rules applicable in ordinary cases. When direct statements are made on the subject it is often denied that such difference exists, but in practice such difference is almost uniformly admitted, by implication, if not in words. But why is "this action not controlled by the ordinary rules of pleading?"

The Codes say:[4]

"The forms of all such actions heretofore existing are abolished; and in their place there shall be hereafter but one form of action, which shall be called a civil action."

The Codes of Oklahoma,[5] Kansas, Nebraska, and many of the other states contain the following:

"The rules of pleading heretofore existing in civil actions are abolished; and hereafter the forms of pleadings in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this Code."

The Codes of another group of states omit the first clause of this section, but contain the latter clause, while the Codes of other states contain language of similar import, but with varying phraseology.

Then the Codes prescribe general rules for pleading in this "civil action." The general rules stated are apparently intended to cover all "civil actions." Replevin actions are not excepted from the general rule, and there are no special pro-

[2] 51 Neb. 98, 70 N. W. 506.

[3] Note.—By act of Congress the laws of Arkansas were in force in Indian Territory prior to the admission of Oklahoma as a state, and the case here cited had been tried in the lower court under the Arkansas practice before statehood, and then appealed to the state supreme court.

[4] Okla. Comp. Laws 1910, § 4650; Kan. Stat. 4087.

[5] Okla. Comp. Laws 1910, § 4735; Kan. Stat. 4168.

visions for replevin except the affidavit, bond, etc., which are ancillary to the main issue, and as to the judgment, none of which are a part of the pleadings. The supreme court of Oklahoma Territory used the following language in Hendrickson v. Brown:[6]

"Section 10, Civil Code, abolishes all distinction between actions at law and suits in equity, and the forms of all such actions and suits, and substitutes therefor one form of action, called a civil action. The term 'civil action' embraces every form and character of action, or suit in equity, that was known to legal jurisprudence prior to the enactment of the Civil Code. It embraces actions *ex contractu, ex delictu,* suits in equity, mixed actions, and all their various modifications."

Professor Pomeroy, in his work on Code Remedies, says:[7]

"All differences which belonged to the external machinery by which a judicial controversy was conducted up to the judgment itself have been swept away. One action, governed in all instances by the same principles as to form and methods, suffices for the maintaining of all classes of primary rights and for the pursuit of all kinds of civil remedies. . . . It is established, therefore, that a single judicial action, based upon and conformed to the circumstances of each particular case, whatever be the nature of the primary right which they create, must be used for the pursuit of all remedies, legal or equitable."

This language is very comprehensive, but not more so than the Code itself. It was the clear intent of the legislature that there should be one form of civil action, and only one form, with a uniform system of pleading, in which the plaintiff should state specifically the facts constituting his cause of action, and the defendant should deny what he saw fit to deny, and then specifically plead all matter constituting affirmative defense which he wished to prove, but the courts have said that replevin is an exception to the rule, while the legislature has made no such exception. The language of the court that "this action is not controlled by the ordinary rules of pleading" must have been induced by historical considerations, rather than by the language of the Code.

Vallancey v. Hunt, 20 N. D. 576, 129 N. W. 455, 34 L.R.A.(N.S.) 473, is an interesting case on this point, interesting because the court divided on the subject as to what could be proved under a general denial in replevin. The majority of the court undertook to determine the case by "the ordinary rules of pleading," while the chief justice, dissenting, held, in effect, that the case should be decided according to the common practice, so as to admit a defense in the nature of confession and avoidance under the general denial, and both the majority and minority opinions attempt to bring the rule in replevin within the general rule that no new matter may be proved unless pleaded. The majority opinion, while based upon and sustained by the "ordinary rules of pleading," is not sustained by the authorities it quotes. It quotes 31 Cyc. 697, where the "general rules" as to pleading, counterclaim, set-off, and recoupment are discussed, but where replevin is not referred to. It then quotes 34 Cyc. 1417, where the availability of a counterclaim or set-off as a defense in replevin is discussed, but the form of pleading is not referred to. If we turn to 34 Cyc. 1476, we find that the decision in Vallancey v. Hunt is not sustained, but that that authority sustains the rule given in the authorities hereinbefore quoted. The same inaccuracy also occurs in the use made of the Oklahoma case of Payne v. McCormick, 11 Okla. 318, 66 Pac. 287, in which case the plaintiff replevied property, which it claimed under a chattel mortgage, for the purpose of foreclosing the same. The supreme court held that under the general denial the defendant could prove warranty and breach thereof, a new promise as consideration for a renewal note, and fraud in inserting in the mortgage property not intended by the defendant to be mortgaged, and, in passing on the case, used the following language:

"Under our Code, the gist of the action of replevin is the wrongful detention by the defendant as against the plaintiff, and under the general denial

[6] 11 Okla. 41, 65 Pac. 935.
[7] Pom. Code Rem. 4th ed. pp. 15, 16.

the defendant may prove anything that will tend to prove that he does not wrongfully detain the property as against the plaintiff. He may show that he does not wrongfully detain it by showing that he rightfully detains it, or by showing that the plaintiff has no right to the possession. . . . The general denial put in issue the question as to the right to the possession under and by virtue of the mortgage. . . . If the mortgage was fraudulently obtained, then proof of such fact would operate to defeat the lien, and consequently the right of plaintiff to possession. Under the authorities above cited, this defense was proper to be made under the general denial, and it was error to exclude it."

This language is not mere *dictum* or unguarded expression, but it covers points that were essential to a decision of the case before the court, and were vital to the issue under consideration; and the decision of the court in this case followed, both as to language used and as to substance, earlier decisions of the same court, and a long, unbroken line of decisions down to the present time support the same doctrine. The recent case of Francis v. Guaranty State Bank, 44 Okla. 446, 145 Pac. 324, uses practically the language quoted above from Payne v. McCormick, and this is the established practice in Oklahoma and in nearly all of the jurisdictions in this country at this time, and the effort of the North Dakota court to bring the established practice as to what may be admitted in evidence under a general denial in replevin within the "ordinary rules of pleading" does not seem to me to be successful.

The general rule, applicable to all civil actions, is that, so long as the burden of proof remains on the plaintiff, the defendant may, under the general denial, show any facts which tend to disprove (deny) what the plaintiff must prove to establish his case, and this is sometimes held, even though it permits the proof of new matter; but the new matter must be of such nature that its effect is to deny, and not in the nature of confession and avoidance. The large amount of confusion of opinion on this point is due to a failure to properly distinguish new matter which simply denies what the plaintiff must prove, from new matter which sets up an affirmative defense. Space does not permit me to give illustrations of the two classes of new matter, nor to follow out the reasons that sustain the illustrations. Let us pass over the reasons and look at the results from a practical standpoint.

What is the object of the answer in any case? Manifestly the only objects are to notify the plaintiff what he must prepare to meet and to form the issues for the court to try. Anciently in some jurisdictions, each party was required to serve notice on his opponent, by directly delivering a formal notice to him or by having it served by an officer, stating exactly the points he would attempt to prove, and then, in offering evidence, he was confined to these points. With us it is considered that the answer being on file imparts sufficient notice. All agree that notice of what the defendant will attempt to prove ought to be given by the answer, but there is a great variety of opinion as to how specific the answer ought to be and as to what is sufficient in different cases.

In the case referred to at the beginning of this article, if the plaintiffs had sued directly on the notes, the defendants would have been required to plead the warranty and breach thereof, the facts showing the fraud claimed to have been practised, and the facts showing the failure of consideration, before they could have proved them. Such pleading would have been required to give the plaintiffs notice of what they would be required to meet, and without the notice they would not have been required to meet such charges. But when the petition, alleging the same facts as if the action were directly on the notes, changed the prayer and added the ancillary proceeding for the temporary possession of the property, but did not change the real issue in the case, the defendants were permitted to prove all of these facts under the general denial. If, in a suit on a note, justice requires the defendants to notify the plaintiff, by proper allegation in his answer, that he intends to prove fraud, mistake, failure of consideration, warranty and breach thereof, or other

affirmative defense, does not the same justice require that the plaintiff be given the same notice in the answer in a suit in replevin?

The practice of admitting all, or nearly all, affirmative defenses under a general denial in replevin seems to have been pretty well established in several of the jurisdictions of this country for several decades past, and I have not observed any general remonstrance against it. Shall we infer from this that it is the best system, and, if so, should that lead us to conclude that too much pleading is required in other classes of suits? The case I have referred to, at the beginning of this article, was tried and disposed of much more speedily than would have been the case if it had been "controlled by the ordinary rules of pleading." In recent years there has been a great protest against the delays incident to the trial of cases under our ordinary court procedure. Could the pleadings in ordinary cases be abbreviated, as has been done in replevin cases, without sacrificing good form and justice to the demand for more rapid procedure? Or should the replevin practice be so reformed that the plaintiff will be entitled to notice of what is to be proved against him?

A. L. Squire

Resigned

Said Lawyer Quiz when I shall leave
This vale of discontent,
One man for me alone may grieve
When he desires my rent.

The world will never know I've gone,
From public press or print,
Unless from mere statistics shown
The public gets a hint.

So why should I a day pass by
Without a joyous round,
Well knowing I so soon shall lie
Unthought of under ground?

And saying this he smiled a bit
As happy as could be,
And exercising mother wit
Went hustling for a fee.

Wm D Fetter

Lord Stowell's Prize Court Decisions and the Great War

BY E. S. ROSCOE

Registrar of the Prize Court of Great Britain and Ireland

[Ed. Note—This extract from Mr. Roscoe's book, entitled "Lord Stowell; His Life and the Development of English Prize Law,"—is reproduced by courtesy of the publishers, Houghton, Mifflin Company, Boston and New York.]

HEN war was declared on August 4, 1914, by Great Britain against Germany, it was but a year short of a century since the second Treaty of Paris, when Lord Stowell's judicial work in the prize court came to an end. One need not emphasize the differences which exist betwen maritime trade and international commerce at the beginning of the twentieth and of the nineteenth century. Nor is it necessary to dwell on the changes which have occurred in English law and procedure, or on the characteristics of modern English judicature as compared to those of a century ago. Unquestionably, however, there could be no sharper test of the value of Stowell's work than the manner in which it responded to the examination of advocates and of the Bench during the present war. Through this it has passed with increased reputation, and it remains still the basis of English prize law, with its value enhanced in consequence of the respect which has attached to a decision of Stowell which in any way confirms or elucidates a judgment either of the prize court or of the Privy Council. It is further a tribute to Lord Stowell's sagacity, and to the form in which his decisions were conveyed, that they have been applicable to changed mercantile conditions. His judgments keep pace with us, they are archaic neither in reasoning nor in manner; they are, in fact, modern because they are true.

As this is not a treatise on prize law it is necessary only to examine in a few instances the relations between Stowell's decisions and those of the prize court in the present war. In 1804, for example, Stowell laid down an important and far-reaching principle,—that the prize court would not recognize liens on any enemy vessel, and that consequently in the case before him the holder of a bottomry bond had no right to claim in the prize court against the proceeds of a captured vessel.[1] Bottomry bonds in the eighteenth century and in the early years of the nineteenth century were documents of much maritime importance; they were charges on a ship, and the holder of them had a lien or claim on the vessel for the sum of money which he had advanced. Under the name of respondentia bonds they were charges on cargoes. To-day one and the other have almost disappeared, for communication over all parts of the globe is so rapid that quicker methods have been reached for advancing money to the masters of vessels in distant parts of the world.

In connection with cargoes modern commerce has developed a far-reaching system of advances by bankers on the security of bills of lading. Cargoes are mortgaged to bankers, who thus finance sellers long before the cargo is actually delivered; millions are, in fact, lent on this form of security. The object of these transactions differs entirely from that of the old-fashioned advance on bottomry or respondentia bonds to a master of a ship who is without money in a distant part of the world. But the result of the transaction is the same; it

[1] The Tobago, 5 C. Rob. 218, 1 English Prize Cases, p. 456.

creates a creditor's lien on the cargo. In these circumstances Lord Stowell's principle was sharply tested. In the case of The Odessa[2] the claimants were bankers who had accepted bills of exchange in favor of the sellers against the cargo, and received the bills of lading as security for the acceptances and for the money paid under them. This was evidently the kind of case in which decisions so mature as The Tobago, and The Marianna,[3] which followed the earlier case, were certain to be attacked as inconsistent with modern commercial practice. The first words of the counsel for the claimants were on these very lines: "This case is of the first importance, as the bill of exchange on London is the general means all over the world of financing the owner of any cargo during its carriage; and bankers would have been in consternation if they had thought that in case of war their security would be gone." In spite of this protest the doctrine laid down by Lord Stowell was upheld by Sir Samuel Evans in the prize court and on appeal by the Privy Council. This tribunal more especially boldly based its decision on Lord Stowell's judgments in The Tobago and The Marianna. "The case of The Tobago is in point," said Lord Mersey in the judgment which he delivered for the court. Lord Stowell, after observing that the contract of bottomry was one which the admiralty court regarded with great attention and tenderness, went on to ask: "But can the court recognize bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a court of prize?" and he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel, and says: "If there is no change of property, there can be no change of national character. Those lending money on such security take this security subject to all chances incident to it, and, amongst the rest, the chances of war." Throughout the case the principles and their general application, as they are found in the judgments of Lord Stowell, were approved, and the law as formulated by him was agreed to, by Sir Samuel Evans and the Privy Council.

While these present-day decisions are a remarkable tribute to the permanent value of Stowell's judgments, one does not feel so sure that, under the altered circumstances of the age, he might not now have found some ground by which to limit the effect of his previous judgments. It is common knowledge that in the present war an official committee has investigated claims which have been rejected by the prize court, of those persons or firms, British or neutral, who have advanced money on enemy goods in the ordinary course of business, that it has recognized in certain cases their claim, and that orders have been made by it for the payment of such claim out of the prize fund. It is not wholly satisfactory that—as the case is—the decision of the prize court should be considered as legally sound, but indefensible from the point of view of commercial equity. In Stowell's time in most cases of capture the proceeds passed into the pockets of the captors, and it was largely to protect the captors, whose claim would have been defeated by the recognition of liens, that Stowell decided against such claims. But to-day the proceeds of prize—both of captures at sea and of droits of admiralty—fall into the Exchequer. One day therefore the Crown successfully opposes claims in the prize court, on another outside the court it amicably recognizes them.

The continuity of British prize law as formulated by Stowell was, at any rate, sustained, and the flexibility and adaptability of the English juridical system was once more demonstrated.

This is but one example of the vitality of Stowell's work, which was again shown in The Roumanian,[4] in which case his decisions were relied upon both by Sir Samuel Evans and by the Privy Council. One of the main questions in this case was whether oil, which was admittedly enemy property and which had been landed at the instance of the customs authorities, was the subject of prize, since it had not been seized at sea,

[2] 1 British & Colonial Prize Cases, pp. 163, 554.

[3] 6 C. Rob. 24, 1 English Prize Cases, 518.

[4] British & Colonial Prize Cases, pp. 75, 536.

but when in tanks on land. Here again the luminous statements of Stowell in The Two Friends[5] and The Progress[6] were followed. "In neither case," to use Lord Stowell's expression, "was the continuity of the goods landed as cargo in any way interrupted." It was thus in fact a maritime seizure.

It has now been shown how, in two cases in which questions of prize law widely apart were raised, the authority of Lord Stowell was regarded as of preponderating weight. A third instance,[7] which differs altogether from those previously selected, may be given, in which the point was whether or not Russian shipowners, subjects of an allied Power, were entitled to claim from the Crown, as captors, freight upon the enemy cargo which was carried in their ship under a charter with a German firm. Sir Samuel Evans held that the reasons against this claim could not be more clearly enunciated than by a quotation from a judgment of Lord Stowell; it is grounded on broad principles which could be applied to facts as they arose. This decision he in fact incorporated with, and made the basis of, his own decision. "The general principle," he said, "is nowhere better stated than by Lord Stowell in The Neptunus (1807) 6 C. Rob. 403: 'It is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in of admitting particular relaxations; and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express, contract, that one state shall not do anything to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be that it will supply that aid and comfort to the enemy, especially if it is an enemy depending, like Holland, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It would seem that it is not enough, therefore, to say that the one state has allowed this practice to its own subjects; it should appear to be at least desirable that it could be shown that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state.'"

Further instances in the same sense might be multiplied; it is sufficient to give one in addition to those already collected. In this the point of law was short, namely, whether the Crown as captor of a ship was entitled to freight.[8] Here again an extract from the judgment of Sir Samuel Evans, without comment, will suffice: "The Crown claim to have a lien for the freight alleged to be payable in respect of the portion of the cargo released, and to have it paid before the release. The argument on behalf of the Crown is that the shipowners are, by the German commercial law, entitled to some freight in respect of this released cargo, although it was not, and cannot be, delivered in Germany at the port of destination, and that as captors they are entitled to what the ship has earned as well as to the ship herself." This sounds quite logical, but the practice of prize courts (which has to deal with multifarious business affairs) shows that, although substantial justice is done, the results of what strict logic may appear to involve cannot always be attained. The old rule as to whether captors of an enemy vessel were also entitled to freight was quite clear.

Whenever a captor brought goods to

[5] 1 C. Rob. 271, 1 English Prize Cases, p. 130.

[6] Edw. Adm. 210.

[7] The Parchim, 1 British & Colonial Prize Cases, p. 579.

[8] The Roland, 1 British & Colonial Prize Cases, p. 188.

the port of actual destination according to the intent of the contracting parties, he was held entitled to the freight, on the ground that the contract had been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage.

The rule was laid down in The Fortuna (1802) 4 C. Rob. 278, 1 English Prize Cases, 392, and The Vrow Anna Catharina (1806) 6 C. Rob. 271, 1 English Prize Cases, 552; and some exceptions which emphasized the rule were dealt with in The Diana (1803) 5 C. Rob. 67, 1 English Prize Cases, 424, and The Vrouw Henrietta, reported in a note to The Diana at p. 75, and in 1 English Prize Cases, at p. 427.

No examples than those which have just been given could more clearly illustrate the fundamental position which Lord Stowell's decisions occupy at the present day, not only in British prize law, but in that of the United States. In England they take the place which government regulations hold in continental courts, as, for example, in German prize law. "Since it had to be decided that the entire cargo of the vessel was subject to seizure as conditional contraband and to confiscation (prize order No. 42), the vessel was consequently also liable to be held up according to prize order 39 and confiscated as per prize order No. 41, Part 2." [9] This extract from a judgment of the Hamburg prize court shows how administrative decrees are used in the German prize courts. Whether they are in accordance with the provisions of international law is immaterial to the tribunal; what is written is accepted as law, whether sound or unsound, whether just or unjust.

The various results, political, economical, and legal, of the great war of the twentieth century will hereafter be chronicled by future historians. To the critical observer of English jurisprudence and of international law, it is, however, already sufficiently clear that the great achievement of Stowell, the several characteristics of which have been considered in the preceding pages, has, during the course of the war, been at once tested and justified, and that it remains fixed more firmly than ever as the cornerstone of one branch of British jurisprudence.

Many reasons will have occurred to the reader for this result; they are, however, most clearly understood if we apply to the Stowell case law the test formulated by an eminent English jurist of our own age, that is to say, a modern test. "From the Peace of Westphalia," wrote Professor Westlake, "to the present day the great desideratum of international law has been the union of reason and custom in a satisfactory body of rules, satisfactory in the sense in which alone the term can be applied to arrangements made or accepted by man, as supplying a system capable of being put in practice under actual conditions and fairly meeting the needs which arise from them, without excluding improvement or modification to suit changed conditions." [10] The Stowell decisions are "a satisfactory body of rules," they are "a system capable of being put in practice under actual conditions," they do "fairly meet the need" which arises from such conditions, and they do not exclude either improvement or modification under changed conditions.

The preceding review of Stowell as a man and as a judge necessarily concludes with this note of the present authoritative position of the Stowell case law. It suggests, however, one or two further considerations. It is clear that an international court of appeals for prize cases is outside the range of possibility. The treatment of ships or goods taken as prize is admittedly a matter for national action in the prize tribunals of the belligerent powers. In England that action is based on a well-established body of law administered in a judicial manner,—more judicially than in any other European country, because the court possesses reasoned and recorded precedents to guide it, and pronounces reasoned and recorded judgments. Under such circumstances no necessity exists for an appeal from a national to a non-national court, an appeal which the experience of

[9] The Cocos, Hamburg Prize Ct. Dec. 11, 1915; Lloyd's List Reports, Jan. 26, 1916.

[10] The Collected Papers of John Westlake on Public International Law, p. 66.

the present war shows would, even assuming the procedure to be organized, cause infinite delay and immense practical inconvenience both to neutral subjects and to British government. Apart, however, from this important consideration, it is certain that, since the Stowell case law, as administered and applied by Sir Samuel Evans and by the Judicial Committee of the Privy Council, has been found to form an admirable basis for many modern decisions, no administration could now venture to supersede it, and such supersession is a condition precedent to the work of an international court of appeals. An assimilation of the prize law of other European countries to that of Great Britain can in the future only be obtained by the international recognition, as expressions of the law of nations, of particular reasoned British precedents, which have been increased in value and number since the outbreak of the war in August, 1914. This is a course which can scarcely be regarded as probable unless it can be accomplished by a diplomatic arrangement. Be that as it may, it is unquestionable, from the experience of the present war, that this country will never consent to part with a body of law which has been so well tested as that which Stowell may be said, for all practical purposes, to have created, and which has continued to be applied impartially in the same spirit of justice as animated the famous jurist who presided over the British prize court at the end of the eighteenth and at the commencement of the nineteenth centuries.

A Departed Lawyer

Life's duties o'er he lies at rest,
  While we must journey on;
The cares, the burdens, that oppressed
  The busy days are gone.

The mind that served the client's need,
  The heart that loved his cause,
From cases and from courts are freed
  To learn of higher laws.

An advocate of right he stood,
  Undaunted 'mid the fray,
And we who watched him, fearless, would
  Prefer that he might stay.

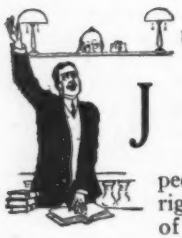
A greater Court its writ had sent;
  Implicit, he obeyed,
As if upon some business bent
  That might a client aid.

Waco, Tex. D. C. Woods.

The Lawyer's Rights and Duties as a Court Officer

BY CARL FREDERICK COOK, LL. M., M. P. L.

of the Seattle, Virginia, and District of Columbia Bars



JUDICIAL administration under our system of jurisprudence is largely government itself. It is the main forum in which the people may protect their rights, obtain rectification of their wrongs and fitting redress of their just grievances. The purity and prestige of the judiciary, its efficiency and effectiveness, and the maintenance of the reverence to which it is entitled; indeed, its very existence as a beneficent social institution,—depend, probably more than on any other factor, on the equipment, character, and conduct of the lawyer.

By reason of the peculiar duty and responsibility incumbent on the lawyer in the preparation and conduct of causes, by reason of his necessary constructive activities, and by reason of the great trust that must necessarily be imposed in him by client, jury, and bench, he is the most important factor in the machinery of justice. And therefore, relatively to his influence, the other factors that enter the equation to heighten or lower public respect for judicial administration are but little more than passive.

The duties of the lawyer are far-reaching, numerous, and various. There is no relation capable of creation by man with which the lawyer does not at some time or other come in contact. His professional duties cover all the civil, religious, and political rights of man.

By reason of the scope and multiplicity of his duties and relations, it is obvious that no fixed and definite rule can be formulated to determine a lawyer's duty in every one of the varying phases of every case. In the absence of express law or any definite rule of practice on the subject, he must judge from the facts in the particular case before him what is right and proper, just and equitable,—his safest guides being the light of conscience, the rule of reason, and precedents established by able and honorable members of the profession in analogous cases.

Creation of Office.—Obviously, the court's existence antedates that of the lawyer, the lawyer holding his office by virtue of the authority conferred by the court. Lawyers are court officers, and were so recognized in the early stages of the law. Lord Hardwicke declared attorneys to be "public officers and ministers of justice."[1] "An attorney at law," said Justice Gray, "is not indeed in the strictest sense a public officer, but he comes near it."[2] Said Lord Holt: "The office of an attorney concerns the public, for it is for the administration of justice."[3] In this connection, Justice Field has said: "The profession of an attorney and counselor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution, . . . they are officers of the court; admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character."[4] Being an officer of the court, he is subordinate to it. The court has the right to pass upon his mental and

[1] Walmesley v. Booth, Barnard, Ch. 478, 2 Atk. 25.
[2] Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239.
[3] White's Case, 6 Mod. 18.
[4] Re Wall, 13 Fed. 814.

moral qualifications; he is subjected to a rigid test as to his legal attainments determined by the court or prescribed by legislation; and his moral character and fitness are certified to by members of the bar in good standing, or are shown in some other satisfactory manner. If he is found qualified to asume the important office of an attorney, he is regularly sworn in as such. His oath in Federal courts is substantially that he will support the Constitution of the United States and its laws, as well as those of the respective states, and "conduct himself as an attorney and counselor uprightly and according to law," and upon taking such oath he becomes an officer of the court admitting him, to which he is answerable for conduct inconsistent with his oath. The oaths of office in the state courts are similar. The admission of an attorney is the exercise of a judicial power resting with the courts. Legislatures, however, may prescribe regulations and qualifications for the office.[5] The right to practice as an attorney in a state court cannot be denied to any citizen of that state, if he is mentally and morally qualified. However, the right to practice in the courts of states is not a privilege of a citizen of the United States under the 14th Amendment of the Constitution,[6] therefore, a state may discriminate in favor of its own citizens. The office of an attorney differs from most other public offices in that, after once created, it cannot be terminated except for good cause. It is similar to the office of a judge whose incumbency continues during good conduct.

The Lawyer's Rights as a Court Officer.

Rights of Office.—The attorney, when admitted to practice, not only becomes licensed to do and perform all the duties incident to that office, and assumes responsibilities in connection therewith, but he assumes, as an officer of the court, even more important duties and responsibilities,—those of assisting in the administration of justice. His self-interest must not countervail the interests of justice. He not only practises before the court, but he is a part of the machinery of the court, and as such owes a dual obligation. The lawyer has certain privileges, the abuse of which is a violation of his professional obligations, and he must perform certain duties, for the failure of which he may be compelled to account not only at the bar of public opinion, but to the court.

While the jurisdiction of courts over lawyers is in some cases provided for by specific legislation, yet it may be said to be an inherent power of the court, for its self-preservation if for no other reason. This disciplinary jurisdiction must be employed reasonably, cautiously, and moderately. It is not intended to be arbitrary or despotic, nor is it to be exercised at the pleasure of the court.

This jurisdiction is commonly exercised by reprimand, fine, imprisonment, and frequently by disbarment. Reprimand, fine, or imprisonment is usually employed to punish the individual. Revocation of license or disbarment, while also designed as a punishment, is regarded as a measure of protection to the court, the bar, and the public, and is imposed on such persons as, by their acts, have shown their unworthiness to remain officers of the court, and whose retention as such would be prejudicial to the dignity of the court and the administration of justice.

All writers upon this subject agree that a court has the power to exercise a summary jurisdiction over its attorneys. It may compel them to act honestly towards their clients, and may punish them by fine and imprisonment for conduct unprofessional and contemptuous. Where the facts warrant it, the court may, of its own motion and without any formal complaint or petition, strike the attorney's name from the roll, provided he has been given reasonable notice and a full and fair opportunity to be heard in his defense.[7] An attorney may be dropped from the rolls as of course upon conviction of any felony, because he has thus been rendered infamous. The United States Supreme Court justifies such action if the attorney has been convicted of

[5] Ex parte Garland, 4 Wall. 333, 18 L. ed. 366.

[6] Bradwell v. Illinois, 16 Wall. 130, 21 L. ed. 442.

[7] Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569.

a misdemeanor which imports fraud and dishonesty, or conduct gravely affecting his professional character.[8]

Termination of office.—Should a lawyer be charged with unprofessional conduct, the commission of a felony, or misdemeanor involving integrity, the question arises as to the stage at which the court may act and impose a fine, imprisonment, suspension, or disbarment. Must the court wait until the lawyer has been tried by a jury and convicted? What rule must govern as to the lawyer's opportunity to be heard?

In all cases the lawyer has the right to be heard in his own defense upon any charge not adjudicated, except in cases of contempt, and where the acts are committed in the presence of the court. In such cases a hearing is unnecessary, as the facts are before the court.

In considering the question whether a court may act on an indictment, or must wait until it has been judicially disposed of, the English courts seem to have followed the rule that an attorney may *ipso facto* be dropped from the rolls on conviction of a felony, or of a misdemeanor involving integrity and his professional character; even though the judgment should be arrested or reversed for error. The English courts have also held that, even without a previous conviction, if the attorney is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney, his name may be dropped from the roll. In such a case, however, if the attorney has fairly denied the charges, the court will take no action until the charges have been judicially determined. This rule has been generally adopted in this country, and in many instances states have enacted special legislation to cover such cases.

There has been a conflict of authority as to the cases wherein the acts are done in a professional capacity and the party has not been previously indicted and convicted. Among the courts holding that a previous conviction is necessary are Pennsylvania,[9] Ohio,[10] Missouri, [11] and Arkansas.[12] The weight of authority, however, seems to be that such previous conviction is not necessary. The courts so holding are the United States Supreme Court,[13] Michigan,[14] New York,[15] Indiana,[16] Maine,[17] and Mississippi.[18]

The extent of the punishment is discretionary with the court, and must depend upon the particular facts in the case. The following instances have been considered sufficient ground for the suspension or removal of an attorney:

Bad character.—This is always regarded as a sufficient cause for removal, as good character is an essential qualification of an attorney. To warrant removal, however, the attorney's character must be shown to be such as to render him unsafe and an unsuitable person to be intrusted with the powers of an attorney.[19]

Disrespect to the court.—For the improper treatment of the court by an attorney, he may be suspended or disbarred. It is not only the lawyer's duty to observe the rules of courteous demeanor in open court, but out of court he should abstain from insulting language and offensive conduct towards the judge personally for his official acts.[20]

Fraud upon the court.—Fraud in procuring admission as an attorney has been held to be a sufficient ground for disbarment.[21]

Perverting justice.—An attorney may be disbarred for perverting, or attempting to pervert, the decision of a case, by deceiving or misleading the court, tampering with the witnesses or jurors, or by making false testimony, and kindred practices.[22] He may be disbarred for

[8] Ibid.
[9] Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637.
[10] State ex rel. Guille v. Chapman, 11 Ohio, 430.
[11] State v. Foreman, 3 Mo. 602.
[12] Beene v. State, 22 Ark. 149.
[13] Ex parte Burr, 2 Cranch, C. C. 379, Fed. Cas. No. 2,186; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569.
[14] Re Mills, 1 Mich. 392.
[15] Re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558.
[16] Ex parte Walls, 64 Ind. 461.
[17] Sanborn v. Kimball, 64 Me. 140.
[18] Ex parte Brown, 1 How. (Miss.) 303.
[19] Bar Asso. of Boston v. Greenhood, 168 Mass. 169, 46 N. E. 568.
[20] Bradley v. Fisher, 13 Wall. 335, 20 L. ed. 646.
[21] Dean v. Stone, 2 Okla. 13, 35 Pac. 578.
[22] Re Keegan, 31 Fed. 129.

falsifying, altering, or abstracting court records.[23]

Fraudulent conduct towards client.—This has been held, and should always be held, as a proper ground for disbarring an attorney. The relation between an attorney and client is strictly fiduciary, and requires the utmost good faith on the part of the attorney. This relation should be enforced to the utmost, and a breach of this trust clearly shows the attorney's unfitness to hold his office.[24]

Conviction of crime. Such conviction is always a good ground for removal of an attorney, as it *ipso facto* shows his unfitness to hold office as such.[25]

The Lawyer's Duties as a Court Officer.

The lawyer as a court officer owes a duty to the court, to the legal profession, to his client, to the public, and to himself. These duties are each discussed separately in a general way. In view of the numerous bar associations, each of which has adopted a code of ethics, more or less complete, and covering the entire field of ethics, the ideas herein set forth necessarily are embodied to a greater or lesser degree in the various codes referred to.

Duties to the court.—The first duty of the lawyer towards the court is that of respect. This respect is enjoined by law, not for the sake of the individual who may for the time be presiding, but in the interest of the universal administration of justice. The lawyer should bear in mind that the court, and not the individual, is the machinery of justice. It matters not how derogatory one's opinion may be of the character or qualifications of the judge, well-founded though such opinions be, the lawyer is not thereby justified in disrespectful conduct towards the court. Should occasion for serious complaint arise, the proper course to pursue, and in fact the privilege and duty of the lawyer, would be to truthfully and logically submit his grounds for complaint to the proper tribunal, and, in such a case, the complainant should not only be protected, but encouraged.

A judge's position is a delicate one, and it is the lawyer's duty to shield and protect him from unjust criticism, especially so by reason of the fact that the judge occupies a position in which he has little or no opportunity to protect himself. Not infrequently public will and sentiment are contrary to law, and in such cases above all the lawyer should be the faithful ally and loyal defender of the court. Criticism of the official conduct of the court tends to weaken the confidence of the public in the administration of justice, and lessens the dignity that should clothe the ministers of justice. The lawyer, therefore, should be the last to cast reflections on the court, and his own demeanor should be such as to create an atmosphere tending to encourage faith in the administration of justice and lend dignity to those charged with it.

The lawyer's relations with the court should be courteous and respectful, but unusual hospitality or undue attention to the judge, when their relations do not justify it, should be avoided, as this subjects both the court and the lawyer to criticism and to a misconstruction of their motives. The lawyer should be self-respecting and independent in the discharge of his duties, but in the discharge of those duties, the lawyer must not withhold the courtesy and respect due the judge's station. It is disreputable to attempt to gain special consideration and favor by any other means. No reputable lawyer will endeavor to influence the court through personal, political, or other similar means. A lawyer should be particularly careful in his conduct before a judge where there are ties of relationship. He should never communicate or argue privately the merits of the case with the judge, as it lays both open to criticism, although there is no evil intent. It is the lawyer's duty to the court to so

[23] People ex rel. Deneer v. Pickler, 186 Ill. 65, 57 N. E. 893.

[24] Jeffries v. Laurie, 23 Fed. 786; Re Boone, 83 Fed. 944.

[25] Re Coffey, 123 Cal. 522, 56 Pac. 448. Attempt to commit extortion. People ex rel. Colorado Bar Asso. v. Varnum, 28 Colo. 349, 64 Pac. 202. Blackmail. People ex rel. Johnson v. Schintz, 181 Ill. 574, 54 N. E. 1011. Larceny. Re McCarthy, 42 Mich. 71, 51 N. W. 693. Felony. Re Wellcome, 23 Mont. 140, 58 Pac. 45. Misdemeanor involving moral turpitude. Re Simpson, 9 N. D. 379, 83 N. W. 541. Embezzlement. H's Case, 5 Pa. Dist. R. 539. Forgery. State v. Holding, 1 McCord, L. 379. Subornation of perjury. Re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L.R.A. 856. Receiving stolen goods.

govern himself at all times as to avoid any possible criticism.

The lawyer should be fair, candid, and truthful in his dealings with the court. To misquote the language of a decision or text-book; to misstate the contents of a paper, testimony of witnesses, or arguments of opposing counsel; to cite a repealed statute or overruled case as authority,—are frauds upon the court and evasions unworthy of any member of the profession. Judges, juries, and honest clients discountenance such practices, and the lawyer only is the loser in the long run. A reputation as a trickster or shyster may easily be acquired, but it can never be successfully overcome.

Nowhere is punctuality a greater requirement than before the bar. I believe that punctuality is half of success, and this applies to all walks in life. This is particularly true in the legal profession. The lawyer should always bear in mind that the time of the court is the property of no individual, and that tardiness wastes the time of not only the court, but of opposing counsel and the parties to the suit. A justifiable excuse for tardiness will usually be accepted, and an apology for it is always due the court; but habitual tardiness places a stamp upon a lawyer, not only in the eyes of the court, but of the public, which the most liquid apology cannot wash away.

There are always opposing parties to a suit, and it of course follows that there must be a losing party. It is very disrespectful to the court for a lawyer to display temper or dissatisfaction over an adverse ruling.

The attorney should at all times be willing to assist the court in the administration of justice, and should graciously accept any duty that may be imposed upon him, particularly in defending accused prisoners.

Duty to the legal profession.—It is the lawyer's duty, not alone to himself, but to his fellow lawyers, to endeavor at all times to maintain the dignity of the profession. He should increase its usefulness at every opportunity. In observing his obligations to his fellow lawyers, he not only discharges a professional and an ethical duty, but a duty to the state, because the profession is so interwoven with the administration of justice that a benefit to one advances the other; likewise an injury to one retards the other.

The lawyer should refrain from disparaging remarks concerning his profession; on the contrary, he should endeavor to sustain its dignity and subdue any manifestation of unjust popular prejudice against the profession. He should keep constantly before him the ideal that the profession should deserve and enjoy the fullest measure of public esteem and confidence.

The lawyer's duty extends not only to protecting the profession against undue outside influence, but to minimizing corrupt and dishonest conduct in the profession. Unprofessional conduct should be promptly exposed before the proper tribunal. A lawyer should never hesitate to accept employment against a fellow lawyer who in the capacity of counsel has wronged a client. He should at all times respect the rights of his fellow lawyers, and should guard against making prejudicial remarks concerning their practices. It is a flagrant violation of professional ethics for a lawyer to transact business with the opposite party to a suit, except through the opposing counsel or by his consent. A lawyer should always be willing to comply with the requests of his fellow lawyers, when to do so is not detrimental to the interests of his clients, and will be of benefit to his brother lawyers. Reason and consideration should guide him in these matters. It must always be remembered that the clients, and not their lawyers, are the litigants, and no ill feeling should exist between the lawyers and any of the parties to the suit.

Duty to client.—The lawyer must be faithful to his client's interests, must be diligent in the prosecution of his cause, and must exercise the utmost skill. It is a matter of course that it is the lawyer's duty to give his client the best service at his command. He should give him the full benefit of his learning and experience. It is his duty to prepare his client's case carefully and thoroughly, exercising the greatest care in the preparation of the necessary papers, in the examination of the witnesses, in the selection of jurors, in the preparation of the evidence

in the case, in the conduct of the trial, and in all other matters which may be intrusted to him. While it is the lawyer's duty to defend his client to the utmost of his ability, it is not the lawyer's duty to do so by illegal or unethical means. No lawyer is expected to know all of the law, but he should have a comprehensive knowledge of the law, and he should be familiar with the rules of practice generally, and particularly those of the court before which he undertakes to practice.

It is the privilege of a lawyer to accept or reject employment as counsel in a particular case, but after accepting a case, it is his duty to continue as counsel until its final disposition. Frequently, the withdrawal by counsel from a suit materially prejudices the rights of the client. A withdrawal is not justified in a criminal case, even though the defendant has confessed his guilt. A withdrawal in a civil suit would not be proper unless it were found that the case was trumped up, fraudulent, or designed to harass an innocent party.

If the lawyer is called upon to defend an accused person whom he knows to be guilty, it is his duty to present every lawful defense, and give his client the full benefit of the law to the end that he may not be deprived of life or liberty or be otherwise penalized except by due process of law.

Communications between lawyer and client are privileged—they are the property of the client, and the lawyer cannot divulge them without the consent of the client. The lawyer should not stir up strife and litigation, but, on the contrary, should as far as possible prevent it, and adjust cases without litigation. The lawyer who successfully prevents litigation deserves more credit than those who successfully prosecute causes.

The lawyer should devote his time to his client's case, and accept no other employment inconsistent with his client's interests. It is the duty of the lawyer to disclose to the prospective client before accepting the case any interest or connection, if any, that he has or may have had with the matter in controversy. After being retained, the lawyer should obtain full knowledge of his client's case before advising him, and his opinion should be candid and honest as to the probable result of the cause. The lawyer should be conservative in forecasting to his client the final outcome of the case. His practice vanishes as hopes so raised fail to materialize.

A most frequent cause for dispute between the lawyer and client, and one that always has a prejudicial effect upon the lawyer, even though he be right, is that of proper compensation for professional services rendered; therefore a lawyer should always have an explicit understanding at the outset as to the amount or probable amount of his fee,—preferably in writing, in order to obviate any subsequent difficulty or dissatisfaction.

Duties to the public and to self.—In fulfilling his duties to the court, the profession, his client, and the public, the lawyer fulfils those due himself as well. While his duties are many, they can all be compressed into the Golden Rule: Do unto others as you would that they should do unto you.

The lawyer should be dignified in his relations with the court, the public, and particularly his client. He should always endeavor to use sound judgment in determining what is just, equitable, and honorable. He should not solicit or advertise for business, nor seek laudation by inspiring newspaper comment, nor magnify the importance of his position in litigations, nor tender his services in a case. He should not indulge in public controversy over the merits of a pending suit. In his argument of the case, the lawyer should not express his belief as to the innocence or guilt of the defendant or as to the merits of the case. He should also avoid testifying in behalf of his client, or becoming a party to the action.

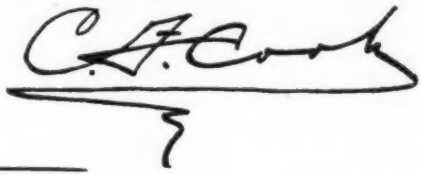
One of the most important relations, and one that requires the strictest application of professional ethics, is where money or other trust property comes into the possession of the lawyer. The lawyer's professional reputation can be lost for all time by reason of a single indiscretion in this. He should promptly report and carefully record the coming of such money and property into his possession, and at the proper time promptly account for the same. It should be carefully kept

apart from his personal property, and proper accounts therefor should be kept, so that in case of any emergency or accident his office books will show the present status thereof. In this connection, it is proper to state that the lawyer should at all times avoid becoming either the borrower or the creditor of a client or presiding judge.

In the court room, the lawyer should prosecute his case in a fair, independent, and dignified manner. He should not endeavor to prejudice the jury by unfair or underhand means, or display special concern for their comfort. He should not converse with the jurors concerning the case, and, in fact, it is the better policy to avoid all communications with jurors, even as to matters foreign to the case, either before or during the trial.

In his practice, the lawyer should at all times bear in mind that he is an agent in the administration of justice, and money should not be his sole object. Justice should be the goal, and justice alone should be the guiding star, regardless of the pecuniary benefit likely to result to the lawyer. He should be ever ready to assist an indigent prisoner, and should always be a friend to the defenseless and oppressed.

In all his dealings, with whomsoever, the lawyer should be fair, frank, and truthful, not alone because it is his duty as a clean and an upright man and good citizen, but because any other course, in the long run, will prove detrimental or disastrous to him.



Sonnets of a Young Lawyer

(He meets a Member of the Rural Bar.)

How seedy did he look in those old pants!
His hat was of the style sold years ago;
That tie he'd worn for many months, I know;
His moustache had the most peculiar slants.
The other lawyers looked at him askance,
He did not seem to think he made a show,—
And quite at ease he was, though rather slow,
Until the time came for him to advance;
And then, ah then, like Job's war horse of old,
He plunged into the battle with a vim.
I did not dream a man could be so bold,
For what it took to win he had in him;
One punch, and he had simply knocked me cold,
And watched me with sardonic smile and grim.

So, judge ye not a man by what he wears,
Or even by the way he trims his beard;
Wise men like fools frequently have appeared,
And wheat is often thick among the tares.
He was one of these harmless old affairs;
In him I saw no danger to be feared,—
From that mild face no lurking evil leered,—
In short, he looked an angel unawares.
He knew more law than I had ever dreamed;
He had a million cases in his head,
And when a point was raised it really seemed
He knew precisely what the courts had said.
Oh, how he soared and like the eagle screamed;
When he got through with me I was near dead.

Hampton, Virginia. JOHN WEYMOUTH.

How to be Sure to Find the Law

BY FRED H. PETERSON

of the Seattle (Wash.) Bar

MEMBERS of the bar are always interested in articles pertaining to the practical work of their profession. Books that purpose to assist or guide the practitioner in consultation, in preparation of cases, and trial practice, relating to the skill and experience of successful lawyers, are eagerly read. Modern law practice is relatively easy as compared with the drudgery of scarcely more than thirty years ago. I have seen distinguished lawyers—Matthew H. Carpenter and Luther S. Dixon—and great judges—Thomas Drummond and John M. Harlan—laboriously write out briefs, opinions, and instructions to juries; although this had one advantage, in that it tended to brevity, while stenography and typewriting have made office and court work agreeable and elegant, and prolixity, no doubt, has become prevalent.

Digests were few and poorly prepared. Bacon's Abridgment, Kent, Story, and Blackstone were often quoted, which are now well-nigh obsolete. Bacon's Abridgment was a standard reference book for several generations; it was much like an encyclopedia. The name permitted puns, and jokes were not always overlooked, especially on circuit riding. I read in a biography of Andrew Jackson, that when he came to Tennessee he put "Bacon's Abridgment" in his saddle bags. While arguing a case the judge doubted Jackson's statement of the law, when he remarked: "I will prove it to your Honor by my 'Bacon.'" But, to his chagrin and the judge's surprise, "Old Hickory" drew forth a slice of edible bacon, amusing everybody except the fiery Jackson, who offered to fight a duel with the friendly joker.

The National Reporter System dates from April 26, 1879, when the first weekly number was issued as the Northwestern Reporter. I distinctly remember the event, for I was interested in it, and read the whole of the first issue. It was numbered at the top of the page, beginning anew with each publication; evidently there was no thought then of printing law reports for the whole nation. From such small beginning has grown the greatest system of reports and the most efficient reporting ever seen. At this time the American Decisions and the American Reports were published; the first in San Francisco, and the latter in Albany, New York. By reason of the excellent work of A. C. Freeman (whom I met personally) and Irving Browne, these sets became very popular and were frequently cited for more than three decades.

A notable event for the legal profession occurred in 1883 when the New York Common Law Reports, Annotated, 80 volumes bound in 18 books, were announced by "The Lawyers Co-operative Publishing Company of Newark, Wayne County, New York," at $1 a volume. No lawyer's library was considered complete without these reports, for they were regarded as a veritable mine of legal lore. I acquired the set as soon as it was published, but have gradually observed its utility fade into desuetude. Who cites New York Common Law Reports now? In the last volume of this state, 92 Washington, there is not one citation from this once famous set, although 1 Washington refers to ten cases. This illustrates that the law shifts rapidly; what is considered law to-day may be inapplicable or in the discard to-morrow. Modern decisions and old cases compiled and annotated in the latest style of leading cases are demanded by the courts and the profession.

These observations were occasioned by reading an article by Mr. Rich in "Case

and Comment" for February, 1917—"A Short Way to Find Legal Authorities." The title attracted my attention; for, when the journal arrived I was running down the authorities on a law point. Some years ago a cartoon was printed by a law publisher, showing an old lawyer in his library gazing at his shelves of books, twisting his thin hair, because he could not find what he sought; he was supposed to be soliloquizing thus: "The trouble is not so much to know the law, as it is to know where to find it."

Of course, every one has his own way, but the method I followed for years is this: If a legal proposition arises,—unless covered by statute or a decision of the supreme court of this state,—I first determine to my satisfaction what the law ought to be from analogy and on general principles of right and wrong; or from the viewpoint of expediency or public policy. Having satisfied myself and formed an opinion, I proceed to find out what the courts have decided; or, as a young lawyer formerly connected with my office naively remarked: "Find out whether the courts were right in deciding the question."

In verifying my notion of what the law should be, I usually refer to the "Index of Lawyers Reports Annotated, volume 1-70 and 1-42 (N.S.)," and the Supplement. For illustration: A lawyer from Ohio wrote that he desired an action brought in the state of Washington to enforce the payment of alimony allowed his client by decree on personal service in Ohio, payable at the rate of $200 per month; nothing had been paid for over fifteen years; plaintiff resided in Ohio, the defendant here. As our statute permits an action upon a foreign judgment within six years, and the *lex fori* governs, it logically follows that any payment in arrears for more than six years would be barred. To confirm my conclusions I referred to the L.R.A. Index, and obviously looked for the title, "Judgments," at the subtitle, "Foreign Judgments," and then to the subdivision, "Enforcement;" there was a reference to "Decree for alimony—see Divorce, § 45," where a citation, Israel v. Israel, 9 L.R.A. (N.S.) 1168, readily led to Arrington v. Arrington, 52 L.R.A. 201, which correctly and logically holds that in a suit upon a foreign judgment for alimony, instalments may be recovered during the statutory number of years preceding the action; each instalment as it matures being considered a new cause of action.

If not satisfied with the L.R.A. authorities, the American and English Annotated Cases offer an excellent opportunity for further investigation; the "Descriptive Word Index of the Decennial and Key Number Digest" presents an almost unlimited field for authorities. After an examination of these reference books—to epitomize the information acquired, or to obtain a concise, authoritative statement of the law based on the highest judicial authority—I usually refer to "Ruling Case Law." It may be asked: "Why first refer to Annotated Cases?" To save time; if one finds a case in point the annotations usually give a satisfactory *résumé* of the decisions, and the cases distinguishing, overruling, or conflicting with the principal case, while the bare report of a decision from another jurisdiction, even if in point, usually requires further investigation.

Of course, there are other books and methods, but I believe for general, everyday practice, where often questions have to be quickly and correctly determined, the above plan is well adapted for good results. At any rate, a lawyer is properly fortified in counseling clients, writing opinions, or in arguing to the court, when he has within easy reach the above-named reference books.

Some one has lamented that "of the making of books there is no end," but I rather say with Thomas Carlyle: "Blessings upon the head of Cadmus, the Phœnician, or whoever it was that first invented books." For surely the practice of law in modern days is a delight and a comfort as compared with the work in the days of crude digests and indices, less than two score years ago.

When the American and English Encyclopedia of Law was first offered to the profession, like many other lawyers, I refused to subscribe because of the prejudice against the class of books then published in encyclopedic form, entitled, "Every Man His Own Lawyer," but Cyc.

and Corpus Juris are indispensable now; we cite them often and advantageously.

A great advance was scored when volumes of L.R.A. were designated by the year of issue in alphabetical order. In this way one may tell instantly when the case was decided, and then locate it in the state or other reports. There is no reason why a perpetual series of reports should be numbered arbitrarily. When the American Decisions were announced, the publishers limited the set to one hundred volumes; but that was the end. All official reports should be designated by the year in place of an arbitrary number. For instance, the United States Supreme Court Reports for 1917 should be 1917A, 1917B, etc. State reports should be labeled in the same way. To refer to Wightman v. Campbell, 217 N. Y. 479, 112 N. E. 184, conveys no information of the time of the decision, but Wightman v. Campbell, 1916A, N. Y. 479, would be definite, and one may then readily trace this case in other publications. This change is bound to come before long, just as sure as the old method of designating volumes by the name of the reporters, when reporting was left entirely to individuals, has become obsolete. Who would adopt for a system of state reports, "1 De Gex, MacNaghten and Gordon," or "4 Christopher Robinson, Admiralty Reports?"

However, the legal profession is greatly obligated to the law publishers who, at large financial risk, overcame great obstacles and performed most valuable services in placing the numerous and ever-expanding body of the law of this most prolific law-producing country in such practical and serviceable shape—in the form of digests, encyclopedias, select and annotated cases, and general reports —that the bar and the bench have been largely relieved of anxiety and drudgery; and through these publications it has become possible to bring the common law of this great nation into a remarkably harmonious system, considering the many overlapping, concurrent, co-ordinate jurisdictions and the various courts of numerous independent states administering our jurisprudence.

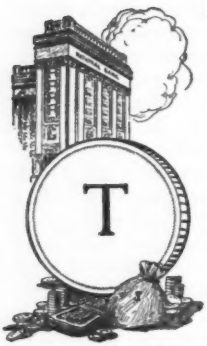
Fred H. Peterson

The Roman Lawyer

Rome was the center of the then civilization and of the laws; they were few, and, to some extent, simple, and yet many of the principles, have become embodied into our laws. The Institutes of Justinian and the Pandects and the opinion of Prætors were their library, and even then but few copies were in existence. Lawyers must, from time to time, consult them, where they could be found. They must have depended largely on their own ingenuity and art and eloquence; the diversity of employment did not exist as now. The history of ages had not been transmitted to them by the printing press, and yet in Rome the advocate was well known and had his followers and clients. Many of the profession, by their wisdom, skill, and eloquence, were leaders in society and in the state, and frequently, by their practice in the law, men of honor and good repute were placed in exalted positions, and many accumulated large wealth.—Hon. J. W. Vandervoort.

Oral Contracts of Fidelity Guaranty

BY HYMEN Z. MENDOW, A.B., LL.B.
Of the Minneapolis Bar



THE increasing amount of insurance law has made us wonder where the courts are going to stop in their efforts to give relief to a premium-paying public. Along with this thought, comes the idea that bonding companies are beginning to contribute to a legal problem that may go as far as the insurance company law has gone. Insurance contracts are now becoming standardized, and bonds, we all know, have a definite meaning to us. Fidelity bonds are increasingly common. At once, then, the question suggests itself, By what law are such bonds governed? Is it the insurance law, or the law of suretyship? In either event, how would the courts look upon an oral contract of fidelity guaranty?

The Statute of Frauds or Code provision which deals with this particular question is almost identical in nearly all of the states of this country. It provides that "no action shall be brought" in any case where there is "a special promise to answer for the debt, default, or misdoings of another" unless "such agreement or some note or memorandum thereof expressing the consideration is in writing." This section has given rise to a great deal of learning in the law of suretyship. It would seem that a contract to become a surety on a bond conditioned on the faithful performance of a duty is a contract of fidelity guaranty and within the wording of the statute. It is not a contract of indemnity as such contracts are ordinarily understood. The only conclusion that can be reached in a study of the question is that, under the rules of suretyship, it is a contract "to answer for the debt, default, or doings of another," a collateral agreement, and required to be in writing under the statute.

The fact that a corporate surety is a party to the contract does not alter the rule. The nature of the business "and similarity in business methods between insurance companies and surety companies" has led to the "delusion that corporate suretyship is different in its nature from private or accommodation suretyship." The judgment of the courts is that corporate suretyship as a business is insurance, and this has led to the rule that "its contracts should be construed according to insurance law." Stearns on Suretyship, p. 442, says: "Corporate suretyship is not a new kind of promise to pay the debt of another. It differs from private suretyship only in the fact that it rests somewhat upon better business methods." Further on he says: "It cannot be doubted that if precisely the same contract is signed in the one case by a private surety without compensation and in the other by a corporate surety for compensation, that the contractual relations and the equities of each surety with the other parties to the contract are exactly alike."

The text-writers have attempted to point out the difference between suretyship and insurance and contracts of indemnity, and all of them reach the same conclusion. Stearns at p. 446 makes the following distinctions:

> Insurance lacks the essential element which distinguishes suretyship from a single contract.
>
> There are three parties to a suretyship contract and only two to an insurance contract.
>
> The promise of one party to answer for the debt or the default in the performance of a subsisting contract of another person is the particular feature which gives rise to all the learning of suretyship law.
>
> Insurance is a simple contract of indemnity between two persons wherein one agrees to compensate the other against loss which results not because of the breach of the contract of another person, but which arises from an involuntary impersonal cause such as accident, fire, or death.

There is not even a fair analogy to be drawn between the two kinds of contracts.

The subject of suretyship arises altogether out of the relation of promisor, principal, and creditor, brought together in one contract, and where this relation exists the rules and equities of suretyship cannot be excluded.

In the same manner contracts of indemnity can be distinguished from contracts of fidelity guaranty. Thus, 20 Cyc. 81, subd. C, says, "Contracts of indemnity are distinguished from those of guaranty and suretyship in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not as in guaranty and suretyship a promise to one to whom another is answerable." And again, 20 Cyc. 1402, note 31, "There is an important difference between a contract of guaranty and one of indemnity. The former, being a collateral agreement, presupposes some contract or transaction as principal thereto; . . . contracts of guaranty must be evidenced by sufficient writing in order to be enforceable. The courts have frequently been called upon to determine whether parol contracts belong to one class or the other." There are a great number of cases on this point, and there is a great conflict of authority. In England the doctrine was finally settled in Thomas v. Cook, 8 Barn. & C. 728, 108 Eng. Reprint, 1213, 3 Moody & R. 444, 7 L. J. K. B. 49. But that case was a contract of one cosurety agreeing to indemnify the other cosurety, and hence no writing was necessary, since it was held to be a direct promise.

But in the matter under discussion, the courts have held that a bond or contract to issue a bond conditioned on the faithful performance of one's office or duties is a contract of guaranty that in the event of failure, the guarantor will answer the consequences. This rule was established in the cases of La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. 805, and in Closson v. Billman, 161 Ind. 610, 69 N. E. 449. The court in La Rose v. Logansport Nat. Bank says:

A concise definition of the term (guaranty) is "a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of some person who, in the first instance, is liable for such payment or performance."

The contract of a guarantor . . . is that he is willing and able, and that he will perform an engagement that he has undertaken or is about to undertake, and that in the event of failure the guarantor will answer for the consequences. Whether the contract is entered into separately or jointly with the principal . . . and the obligors agree therein that the principal will pay or perform according to his original engagement and that they will answer for his default in the event of failure, they become guarantors. The contract of the one is a direct original agreement with the obligee that the very thing contracted for shall be done. The other enters into a cumulative collateral agreement by which he agrees that his principal is able to and will perform a contract which he has made or is about to make, and that if he fails he will, upon being notified thereof, pay the resulting damages.

The bond was not the original or principal contract, but was collateral, or in addition to, or by the side of, the engagement of Goodwin to the bank, and being so collateral it is brought within the very terms of a guaranty.

In the headnote of the case it is said: "The contract of the sureties in the bond of a bank cashier, conditioned for the faithful performance or discharge of his duties by such cashier, is a contract of guaranty."

Thus, it is clear that a contract to answer for the failure of duty or default of a person is a contract of fidelity guaranty; that such contracts are collateral promises, and are not contracts of indemnity or insurance, nor a direct promise of suretyship. The rules of insurance in the same manner do not apply to oral contracts of fidelity guaranty, but apply only to the interpretation and construction of written and executed contracts of fidelity guaranty. There can be no question at this date that a contract of fidelity guaranty will be construed by the courts in the light of rules of insurance construction. The reason for this rule is, as stated before, the great likeness between the nature of both kinds of business. The courts seem to feel that as a matter of public policy this new kind of suretyship should be governed by the same rules and regulations that apply to insurance business. Insurance as a business has become very highly specialized, and since fidelity guaranty so closely resembles it, it will be

much easier for the courts and for public authority if the same rules and constructions be applied. The courts have laid particular stress in these cases upon the rules applied in fire insurance cases, and have sought to establish those rules in fidelity guaranty cases. Oral contracts of fire insurance have been held valid in a great variety of form, but there is no authority anywhere that holds an oral contract of fidelity guaranty valid upon any theory. In the application of the insurance rules to such contracts of fidelity guaranty as have been construed the courts have been called upon to decide not the rights of the parties as pertaining to the formation of the contract, but rather the effect of the contract after it has once been completed; not as to the validity of the contract which is not evidenced by writing, but rather the construction of the policy or bond of guaranty after it has been issued.

Many cases and decisions can be found in which the courts have gone the limit, so to speak, in adopting the insurance rules. In Fidelity & C. Co. v. Eickhoff, 63 Minn. 170, 56 Am. St. Rep. 464, 65 N. W. 351, 30 L.R.A. 586, the Minnesota supreme court established the leading rule on the subject. The case is widely quoted and followed, but in that case the bond had issued, and it was only for the court to determine the rights of the parties under the written agreement. The court in its headnote to the case calls particular attention to the fact that it does not decide the validity of the contract when it says: "A contract of plaintiff with defendant's employer, guarantying his fidelity as employee, construed." (See also Dunnell's Minn. Dig. Supp. 1912, § 9105; George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 128 N. W. 12, 33 L.R.A. (N.S.) 513; Gamble-Robinson Co. v. Massachusetts Bonding & Ins. Co. 113 Minn. 38, 129 N. W. 131; Shakman v. United States Credit System Co. 92 Wis. 366, 53 Am. St. Rep. 920, 66 N. W. 528, 32 L.R.A. 383, holding that the surety company was bound under the rules of the insurance statute, and that the *business* was insurance, but does not decide whether the contract was *suretyship* and controlled by the rules of suretyship law.) Stearns on Suretyship, p. 444, says: "Similar comment might be made properly as to a large number of other cases which purport to construe insurance statutes and apply their restrictions and regulations to surety companies. They do not decide the suretyship question involved as to the nature of the contract relation."

As to oral contracts of fidelity guaranty, we can only find one decision in Anglo-American law that deals with this question. Upon principle and upon such authority as can be gathered from text-writers, it is undoubtedly the rule that an oral contract of fidelity guaranty is within the very letter of the Statute of Frauds. Some thinkers on the question have made the argument that since the surety company is paid, different rules should be applied to the nature of the contract. Stearns at p. 448 says:

> The contract of a surety company, although compensated, is within the very letter of the Statute of Frauds. It is a collateral promise to pay the debt or answer for the default of another, and will not be binding unless in writing.
>
> When the surety is beneficially interested in the carrying out of the main contract, as where the main contract subserves the pecuniary purpose of his own, his collateral agreement to answer for the due performance of the principal contract is considered outside of the Statute of Frauds and constitutes him an original promisor.
>
> But the payment of the premium as an inducement to enter into a suretyship contract does not constitute a novation, as the surety on this account derives no interest in the outcome of the main contract which he secures.
>
> A premium paid is the bonus or inducement to the surety company, but is not the essential consideration out of which the contract grows.

Thus, it is at once apparent that a paid surety contract does not come within the "main purpose" rule and is not a novation, and hence is not taken out of the Statute of Frauds.

Spencer on Suretyship, § 64, says, "Debt, default, or miscarriage." "This phrase is peculiarly broad and sweeping, and includes apparently every case in which one person may become liable for another's breach of legal duty toward the promisee whether such breach is redressable in an action of contract or tort." At § 70 the same author says:

"Where a contract is strictly one of corporate fidelity guaranty insurance, it would seem on principle that the Statute of Frauds is inapplicable to its oral undertaking, *though such undertaking is within the letter of the law.*" There seems to be little direct adjudication on this subject, though in Com. use of Ledford v. Hinson, 143 Ky. 428, 136 S. W. 912, Ann. Cas. 1912D, 291, L.R.A. 1917B, 139, the statute was held to apply.

The case just mentioned seems, after diligent search, to be the only case in Anglo-American jurisprudence that squarely decides the point we raise. In that case the liability of the surety company was sought to be extended on a bond by oral agreement of the parties. The court says:

> Recognizing the force of the argument that the terms of the bond confined the obligation of the surety to the expiration of the first term, the attempt is made to avoid its effect by the assertion that the surety company agreed, in consideration of the payment to it by Hinson of the full premium for one year, that it would remain bound as his surety for the year if he was reappointed, and that the agreement was approved by the mayor and council. But this agreement on the part of the surety company was not in writing, and was therefore within that section of the Statute of Frauds providing that "no action shall be brought to charge any person upon a promise to answer for the debt, default, or miscarriage of another, unless the promise or some memorandum note thereof be in writing and signed by the person to be charged therewith or by his authorized agent."
>
> This statute presented a complete bar to a recovery against the surety company. The fact that it received a consideration for entering into the verbal contract relied on did not have the effect of making it liable when, in the absence of such consideration, it would not have been. The payment of a consideration cannot supply the place of a writing signed by the person to be charged or have the effect of taking out of this statute an agreement that would otherwise be void.
>
> We think the lower court correctly ruled that the petition as amended did not state a cause of action against the surety company.

The Kentucky court is the only one in this country or Canada or England that has dealt with the issue here directly. The case was decided upon a demurrer, and it lays down the rule definitely as to oral contracts of fidelity guaranty. In this case the court would not even allow an extension of an executed bond of fidelity guaranty by oral agreement. Surely, then, the court would not, and no court should, go beyond such rule and say that the whole contract itself may be primarily completed by oral agreement and enforced as such. The Kentucky case seems to be conclusive of the proposition. Such oral promises have already been shown to be within the letter of the statute. If the purpose of the statute is to be carried out, how can it be said that the surety company ought to be bound by an oral agreement? If it should be held that a surety company is liable on oral contracts, then that which is now required to be in writing may be proved and pleaded without such writing. Each party to the agreement may present his own views of the contract, and it will allow plaintiff to recover on mere oral statement. It will, at all events, substitute the jury for the statute by permitting the jury to determine what the terms of the agreement are. This will, of course, open wide the door for fraud and perjury and give opportunity for the very thing the statute seeks to prevent. Even where the contract is in writing and the terms definitely expressed, the courts have difficulty in construing them and in establishing the rules that might guide the parties in their dealings with such contracts. Says Vance on Insurance, p. 600: "These fidelity contracts vary so greatly in their terms and the cases construing them so few, that no rules of construction having general application can safely be deduced." How then can a jury do this by depending upon oral proof of a conflicting nature?

There are, however, two cases that might be relied upon because of their language to sustain the proposition that such contracts may be oral. Those cases are Roark v. City Trust S. D. & Surety Co. 130 Mo. App. 401, 110 S. W. 1, in which case the court likens a fidelity bond to a fire insurance policy, but in that case there was a sufficient writing to satisfy the statute. In Allis-Chalmers Co. v. Fidelity & D. Co. (1913; K. B. Div.) 29 Times L. R. 506, 6 B. W. C. C. 98, the court also calls the bond "insurance," but does not decide that it *is* in-

surance. And these cases, we may reiterate, are the only cases in our law that even approach the issue, but do so in language only, and not in decision.

To summarize, then: The Statute of Frauds has for its purpose the prevention of perjury and fabricated lawsuits, and hence requires written evidences of certain kinds of transactions. One of these kinds of transactions is, a promise to answer for the debt, default, or misdoings of another. In order then to enforce the statute oral contracts of fidelity guaranty ought to be governed by the rule of the statute.

I have tried to point out that a contract of fidelity guaranty is not a contract of insurance, but that it is rather a contract of suretyship in the nature of a collateral agreement to answer for the debt or default of another. I have also tried to point out that, although the courts apply insurance rules of construction to fidelity guaranty contracts, they do not decide that they are contracts of insurance, nor do they decide that an oral contract of fidelity guaranty is either a contract of insurance or that it is to be governed by insurance rules. That the oral contract is within the very letter of the statute cannot, upon authority, be denied, for the only decisions on the point hold that such an oral contract is unenforceable and void.

Thus, it will be seen that although the propositions advanced here are novel, they bear an important relation to a new and growing form of business. In this age of hurry and credit, one is too likely to rely upon oral assurances. It is just these assurances that may, unless we proceed with caution, cause heavy losses of money and nerve and mental energy. The safe rule to our mind is that we urge at all times upon the courts the safety that lies in the wording and purpose of the Statute of Frauds.

Cause of Early Prejudice Against Lawyers

Luther wrote and preached in a period of transition, when the reception of Roman law on the Continent required a process of adjustment to the needs of a new world. Hence his bitter epigrams were congenial to a people irritated by a legal situation not without parallel in the present, and gave rise to many popular sayings of similar import. Political jealousy due to the supplanting of the clergy by the lawyers in the conduct of the state reinforced this tradition and handed it down. For, on the whole, down to the Reformation, the great offices of state had been the perquisites of the clergy. Clergymen had shared the reins of government at most only with soldiers. And in all the growing departments of governmental activity that had to do with the affairs of peace they had been supreme. When they found a new rival in the lawyer, and when this rival pushed them out of one after another of the great offices of state, the pious clergymen could perceive clearly the peril to religion and good morals which this change involved. The zeal which coined such phrases as "Juristen bose Christen, ja diabolisten," "legum contortores, bonorum extortores," "legum doctores sunt legum dolores," "juris periti sunt juris perditi," was born of professional concern at the supersession of the clergy in the kingdoms of this world by the rise of the legal profession, and the natural disinclination of those who had been wont to lay down the law for both worlds, to confine their attention to the less immediately profitable and immediately rewarded calling of preparing for the world to come. Some of these phrases, which gained currency in the seventeenth century, express ideas which are the staple of modern denunciations of the lawyer by teachers of economics, politics, and government.—Hon. Roscoe Pound.

The Seventh Son

BY REYNELLE G. E. CORNISH

of the Portland (Or.) Bar

ARNOLD BARRETT, crossing the lobby on his way home, gave the shabby figure a second glance. Then something in the bewildered, worried face appealed to him, and he swung around impulsively. "Can I do something for you?" he asked. Michael O'Leary looked at him wearily. "I'm needing a lawyer—," he began.

Barrett repressed a smile. "Well," he commented, "that ought to be easy!"

The old man shook his head. "Sure and it's the money I'm lacking to hire one," he explained.

"That does make it a little more difficult," agreed his questioner. "Suppose you tell me just what your trouble is!"

"It's—papers!" said Michael comprehensively, and drew the bundle out of his pocket.

Barrett glanced at them, and hesitated. The dignified code of ethics of the bar frowns upon the lawyer who goes "gunning for clients,"—but a client without money would scarcely be in the *taboo* class. "Well, I am a lawyer," he decided at length. "I think we had better go upstairs and look these over, and we can see what needs to be done."

Upstairs in the lawyer's office, Michael's tongue loosened, and the younger man's sympathetic questioning brought out his commonplace story. Barrett glanced down at the foreclosure papers with their familiar tragedy of unavailing endeavor.

"This seems like a small amount,—$1,100," he commented kindly. "And I happen to know that this particular mortgage company is very willing to meet deserving mortgagees half way. If you had any way of making up the delinquent interest, I am quite sure we could arrange for a discontinuance at a very nominal expense. Haven't you any children who could help you out a little, just at this time?"

"Aye," said Michael proudly. "It's ten, I've had—and seven of them sons, and 'tis little enough of good fortune has supped with any of them, barring only the one. Sure, and 'tis not for nothing he was born the seventh son with the luck mark on him! And well I know he'd not be refusing an O'Leary the wee bit of help in the time of trouble—'tis not his fault that the body of him lies cold in the grave this day week. And 'tis the grand funeral he had, too, with his name in the papers," finished Michael, proudly, carefully unfolding a creased slip of paper from his vest pocket.

Barrett looked over the newspaper clipping, casually at first and then in puzzled bewilderment. It was an ornate account of the funeral of John Arthur Longchamp, the only son of the late James B. Longchamp, who by his father's will had recently come into the possession of the greater part of the Longchamp fortune.

Michael answered the question before it could be spoken. "Sure and he died a Longchamp—but 'tis O'Leary the name of him was when he was born!" he explained, naively.

Barrett's swift interrogations soon put him in possession of the facts. The O'Leary baby and the Longchamp son and heir had been born at the same hospital, within a few hours of each other, the one in the humble obscurity of the charity ward and the other in the quiet seclusion of a private suite. The Longchamp child had lived but a few days, and the father, chancing to notice the O'Leary baby on one of his visits to the hospital, had been taken by some fan-

cied resemblance to his own child and had adopted him.

"Did the younger Longchamp ever know of his relationship to you?" asked Barrett. "Did you ever make any attempt to get in touch with him after he grew up, or after the death of his adopting parents?"

Michael shook his head. "Sure, and 'tis the fear of the law we had against the telling. The lawyer read it to us out of the big book. 'Tis little of love the likes of them had for us, anyway, on account of the old woman."

"You see, 'twas like this," explained Michael, timidly. "There was Mr. Longchamp wanting the young one, and the lawyer standing around with the fine talk of the grand chance 'twould be for the boy, and 'twas us paying little attention to the grand words of them, at all. Sure, and what would we be giving him away for! And then I lost my job at the teaming and it was winter with the jobs as scarce as hens' teeth, and Maggie sick at the hospital and the children crying and fretting at home —and 'tis a hundred gold dollars the lawyer was offering us—and himself no bigger than a pint cup. So, we signed up the bit of a paper, where they showed us.

" 'Twas not so bad with the old woman until she came to leave the hospital. Sure and she'd not let himself go at all, 'til they took him out of her arms, and sent her away. And the next day she went to the Longchamp house and begged for her own back again, and they'd not give him to her, though she threw the gold pieces on the floor, before them. 'Twas then, the lawyer read to us out of a black book the thing that would come upon us if we troubled them more. And 'tis little of trouble we've made for the likes of them since. But the old woman she do still be grieving!"

"I see," said Barrett, clearing his throat, as the tragedy of the meager recital gripped him. "Well, Michael, we'll do the best we can with these papers. I'll see the attorney for the mortgagees and get a stipulation extending the time to answer, and meanwhile we will see if we can obtain a little assistance. It seems to me as if the Longchamp family ought to be willing to help you a little for your son's memory, but we can see about that later. I guess that is all for to-day."

"And 'tis thanking ye kindly," said Michael, but he still hesitated at the door.

"What is it?" asked Barrett patiently. "What seems to be the trouble now, Michael?"

" 'Tis the old woman," burst out Michael, impetuously. "She do be lying with her face against the wall. Sure, 'tis sorrow and fear has eaten the heart of her out. If ye could be speaking to her for the moment and telling her 'tis all right about the papers—but, sure, and 'tis bold I am to be troubling you overmuch!"

Barrett looked at his watch. "That's all right, Michael," he said quietly. "I'll be glad to go along with you now."

The two men found little to say to each other as the overcrowded trolley wound its slow way across the prosperous business district and into the factory section, at the southern end of the city. Barrett was thinking of the contrast between the shabby figure beside him and the elder Longchamp, as he remembered him.

The O'Leary cottage was a drab colored duplicate of an endless procession of shabby, contract-built dwellings, that crowded each other in straight narrow rows, each on their scant 20 feet of ground; but the inside was as neat as a pin and bright with the warmth of red table cloth and patchwork quilt.

Maggie O'Leary lay on the bed, her tired hands folded, primly, outside the coverlet. She turned her head as the door opened, and the look of hopeless waiting in her faded eyes brought the young attorney's heart up into his throat again. Barrett sat down, gently, close to the bed, and tried to tell her a little of the plans for preventing the threatened foreclosure.

"You mustn't worry any more, Mrs. O'Leary," he finished, cheerily. "Michael and I will try hard to save the little house for you, and I know that we will succeed."

"It's thanking ye kindly, I am," said

Maggie politely, but there was no lifting of the grey cloud of hopelessness from the lined face.

"I am quite sure," continued Barrett, trying to touch some chord that would respond, "that the Longchamps will feel it only their duty to assist you, for the sake of your son's memory, and though, of course, there is no legal claim upon them, since there has been a formal adoption, still—" Barrett stopped short, astounded at the blaze of anger that had flared up in the listless eyes.

"Aye," cried Maggie, passionately. "Well do I know it! They made him a Longchamp in name with the black paper, and bad 'cess to the day they put pen in my hand for the signing of it. But 'tis O'Leary the flesh of him was, and the blood in his veins. And 'tis not in him to rest easy under the headstone of a Longchamp—ye mark my words. Sure, and the soul of him will come back to his own. Never a bit of the good fortune will come to the Longchamps for the keeping of him. 'Tis O'Leary the luck of him was, and to the O'Learys he'll come back—ye mark my words."

Her voice trailed away in a strained whisper, and she lay back exhausted on the pillow.

Michael pulled anxiously at Barrett's sleeve. "Will ye be coming away, now?" he begged. "Sure, and she be meaning no harm with her talk."

Barrett followed him outside in silence. "Ye'll not mind what she said?" asked Michael, anxiously. "Sure, and it grieves her that himself must lie with the grand folks in the cemetery, and not with his own. She means no harm—but they'd not let her see him in his coffin, and it lays heavy against her heart."

"It's a shame," said Barrett, unsteadily. "I'll do what I can, Michael."

The slow trolley wound its uninteresting way back to the business section of town. "It's a shame," repeated Barrett, hotly to himself. "They had no moral right to that youngster in the first place, but we would have a small chance of proving duress or fraud at this late date. Of course, as things stand, the O'Learys have no legal standing whatever, but it seems as if the Longchamps ought to be willing to do something out of mere decency."

The stipulation extending the time to answer was obtained without difficulty, and Barrett made use of the respite he had gained to get in touch with the three Longchamp sisters, who would, as the next of kin, take the estate, young Longchamp having died intestate.

But the Longchamps, though they gave liberally to such charities as interested them, were not noted for their tender hearts; and the three sisters, when, after numerous delays, the young attorney had finally obtained an audience, were as cold and immovable as the three fates. His eloquent plea for aid for the old couple who had been the flesh and blood parents of their adopted brother was met by an indifferent refusal to take any interest in the matter, and his insistent efforts to obtain a more favorable reply brought a curt request that all future communications be referred to their legal advisers. So Barrett took up the matter with the Longchamp attorneys.

The interview was short and to the point. In the middle of Barrett's warm appeal, and his eloquent description of the O'Learys' worth and needs, the senior member of the firm of Mowbridge, Hallett, & Newcombe pushed a button for the papers in the case, and, for answer, spread out on the flat-topped desk the adoption papers with their concise phrases.

And when the young lawyer, hot-headed over the brusque finality of the reply and shaken out of his composure by excitement and chagrin, impulsively threatened to find some way to accomplish justice in this worthy case, the older man leaned back and laughed in his face.

Barrett flung himself out of the office and into his own, uncomfortably aware that his zeal had made a fool of him, and aching in every nerve and fiber with the desire to somehow make good his foolish and untenable threat.

His first move was a thorough investigation of the records to make certain that the adoption papers were complete and properly recorded. As if the great firm of Mowbridge, Hallett, & New-

combe would be guilty of an error of workmanship that a comparative novice like Barrett could discover. The wording and execution of the contract were as flawless and as clear as a plate-glass window, and as hard.

Nothing daunted, Barrett stuck to his investigations, and one day he astonished the suave Longchamp attorneys out of their composure by filing the petition of the O'Learys to be appointed administrators of the estate of John Arthur Longchamp, as the next of kin.

The thing was so absurd that no one but an optimist, who still looked upon the law as a shining sword for the cutting of all Gordian knots, would have had the nerve to tackle the proposition. But Barrett, being young, and spurred besides by his own scorching chagrin, plunged hotheaded into the attempt to forge again the chains of kinship which the O'Learys had voluntarily and legally renounced in their son, and which the Longchamps had voluntarily and legally assumed.

The older lawyers laughed at such tilting against windmills. The fact that a legal adoption severs the relationship existing between the natural parents and their child, and that the adopting parents succeed to all such rights and privileges, was not only a well-settled principle of law, but a matter of common knowledge.

The absurd attempt of an Irish teamster and his wife to be appointed administrators, as the next of kin of John Arthur Longchamp, was headlined by the newspapers as a joke.

Barrett was solicitously advised by older and wiser lawyers to drop out of a case, so wholly without merit or standing, that the very bringing of it would arouse suspicion of good faith. The opposing attorneys openly scoffed at the whole affair, as the crudest sort of a blackmailing scheme, and hinted of Bar Association investigations and disbarment proceedings as a possible outcome. Barrett kept his head; but the dignified array of legal talent on the other side opposed an impregnable wall that sickened even his high determination.

The case came to a hearing at last. The seldom filled room of the probate court was taxed to its capacity. To those old walls, accustomed as they were to stare down at like arrayed against like,—brother against sister, and kinfolk against kinfolk,—this case presented a strange anomaly. On one side were the three Longchamp sisters, with their unmistakable air of birth and breeding and their formidable array of legal counsel, and on the other, the obviously commonplace O'Learys with one slim, youthful-faced attorney, their only champion.

Michael sat stolidly in his seat with his eyes lowered, carefully, into the crown of his hat, and his heavy feet scraping uncomfortably back and forth across the bare floor. The overawing solemnity of the probate court had sapped his last atom of courage.

But Maggie, whom the first suggestion of a chance to give battle to the Longchamps had roused from her sick bed, sat with her face turned unflinchingly toward the ranks of the enemy, and the spirit of her fighting ancestors ablaze in her faded blue eyes.

Barrett, his voice shaking under the strain, even in these first formalities, presented the uncontested proofs of the blood relationship of his clients to the deceased, whose estate was in question, and rested, with his prima facie case made out.

The opposing counsel, smiling easily, arose to present the carefully drawn and registered adoption papers, as proof of the legal relationship which had supplanted the natural one.

"We are willing to admit the fact of the adoption," conceded Barrett huskily. "We base our claim on the theory that the blood relationship was not entirely abandoned by the adoption agreement, but still exists and supersedes the adoption agreement in this case!"

The Longchamp attorney was on his feet again. "I will read the adoption statute," he stated blandly. "It would seem to be so clearly and unequivocally worded that the most limited intelligence, if unprejudiced, would have no difficulty in apprehending it. It is as follows:

"'The natural parents shall, by such order, be devested of all legal rights and obligations in respect to the child, and

the child be free from all legal obligations of obedience and maintenance in respect to them; such child shall be to all intents and purposes the child and legal heir of the persons so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations of a child begotten in lawful wedlock; but upon the decease of such person and the subsequent decease of such adopted child without issue, the property of such adopting parent shall descend to his or her next of kin, and not to the next of kin of such adopted child.'[1]

"From this it can be clearly seen that these claimants, the O'Learys, voluntarily and legally renounced all their rights and obligations of kinship with the deceased, and cannot here and now retract their renunciation, and reinstate the ties which they voluntarily severed. The Longchamp claimants are legally the sisters of the deceased, and as such are clearly entitled to take as the next of kin.

"The statute, by its plain and express terms, describes the effect of the act of adoption as a clear and unequivocal renunciation of the rights of kinship, and an establishment of those rights between the deceased and the adopting parents. It is preposterous that any other construction of so clearly worded a statute should hold.

"How, then, in the face of these express provisions, can the counsel for the claimants still persist that the legal rights of kinship still exist between the O'Learys and the deceased, John Arthur Longchamp, who, both in name and in the eyes of the law, is an absolute stranger to the O'Learys, and a legal member of the Longchamp family!"

The last words crashed out triumphantly. The senior counsel was noted for his crushing climaxes. But the young attorney, incomprehensibly, refused to be crushed.

"Our claims are upheld, not only by the construction placed upon the law by the state, from whose statute books we obtained it almost bodily, but by every principle of equity and justice, by which this court has ever sought to be governed.

"It is true that Mr. and Mrs. O'Leary and Mr. and Mrs. Longchamp entered into a contract of adoption whereby the one side renounced, and the other assumed, the burdens and rights of parenthood. As between the rights of the O'Learys and the older Longchamps, we raise no question. But by what right did the older Longchamps assume to contract for all sides of their family? Had they any right to say that all connections of their family, however remote, must be bound involuntarily by a contract to which they were in no way a party? Suppose a distant relative on the Longchamp side had died intestate before the death of the adopted son, John Arthur. Must his estate be apportioned to include a child, a stranger to his blood, whose sole claim on his estate was that of a contract entered into by others, and to which he was in no way made a party? *Contractual obligations cannot be forced upon strangers by the mere act of the contracting parties.* The O'Learys and the older Longchamps could, under the law, shift their legal rights and duties as parents, but they could not raise up ties of kinship with third parties.

"The blood relationship still exists, and, the legal rights of the adopting parents having abated with their death, the relatives of the deceased are entitled to take his property, before the children of his adopting parents."[2]

There was a shifting and murmur in the court room. Reporters, balancing on perilous footing, leaned forward to catch another glimpse of the speaker. The Longchamp counsel crowded together for frantic consultation. The judge stopped smoothing the folds of his gown and lifted incredulous eyebrows.

The thing was absurd,—absolutely untenable. It was without precedent. The words of the statute were plain and uncontrovertible. Such a claim had never

[1] Russell v. Jordan, 58 Colo. 445, 147 Pac. 693, Ann. Cas. 1916C, 760.

[2] Russell v. Jordan, 58 Colo. 445, 147 Pac. 693, Ann. Cas. 1916C, 760; Upson v. Noble, 35 Ohio St. 655; Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445; Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L.R.A. 535; Van Derlyn v. Mack, 137 Mich. 146, 109 Am. St. Rep. 669, 100 N. W. 278, 4 Ann. Cas. 879, 66 L.R.A. 437.

been advanced in this court before. It was preposterous on its face.

And yet—this young man was citing his authorities confidently. The law, after all, is not compounded of facts, but of principles. Here was an attorney who was establishing his claim with uncanny persistency; fitting the fundamental principles of law into the facts before the court like the sections of a picture puzzle; building his claim like a supporting wall, with arguments for bricks, and shaping the whole together into a structure that even the brilliant intellects before him could not demolish.

Before the last words of Barrett's speech had left his lips, Mowbridge, senior counsel for the Longchamp family, was on his feet.

His concluding argument was a masterpiece of eloquence. It soared to the heights of imagery, it swooped to depths of hollow-toned denunciation,—it painted the charm and worth of the Longchamp family in letters of gold, and framed their virtues in pictures of silver! His scorching indignation and burning scorn, had it been registered by Fahrenheit, instead of Blackstone, would have reduced the O'Learys, and their presumptuous slip of a counsel, to a charred cinder. It was a great speech, but it was not the law. And the grave-faced autocrat on the probate bench was there to pass on law, not oratory.

The judge fidgeted uneasily in his high-back seat. His sympathies were with the Longchamps, but the principles upon which the O'Leary claim had been established were uncontrovertible. They reached back into that vast storehouse of the common law, from which the elemental principles of modern jurisprudence have been taken. They had always been there,—that no one had ever thought of applying them to this precise state of facts before, did not make them any less the law. It was like the Columbus trick of standing an egg on end,—obvious enough when once demonstrated.

In reluctant words, whose measured brevity seemed strangely inadequate to the weight of their message, the probate judge rendered the momentous decision that passed into the bewildered hands of Michael and Maggie O'Leary the proud splendor of the Longchamp wealth.

The thing was incredible—Barrett stared across the counsel table at the shabby, unpretentious figures of his clients with a feeling almost of awe.

"We've won!" said Barrett huskily.

Michael stared back at him uncertainly. "Do—do ye mean that they'll not be after taking the default?" he questioned, hesitatingly.

But Maggie brushed aside such trivial details impatiently. "Did ye hear that, now!" she cried triumphantly. "Did ye hear now what the judge said? The brave laddie is ours! Sure, and the black paper lied—'tis as nothing now and to be laughed at. Do ye mind Michael, the wee lad that he was—with the silver chain about his neck! And the smile he gave ye, when ye clasped it on him! Well, I remember the look of him and the feel of his fingers on my breast. Sure and I've been feeling of them through these long years." The luck child ye named him, and well I knew he'd not fail the O'Learys in the time of trouble—."[3]

"You will inherit from your son a very large amount of money and property, Mrs. O'Leary," continued Barrett, impressively, trying to bring home to the simple couple, some comprehension of the fortune that had befallen them.

"Aye," said Maggie, softly. "Sure and the O'Learys were always strong for their own!"

Reynolds L. Cornish

[3] Author's note.—Although the law in this story is supported by numerous authorities, there is a lack of uniformity of opinion in various courts of last resort concerning similar statutes. The following cases have taken the contrary view: Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788; Hilpire v. Claude, 109 Iowa, 159, 80 N. W. 332, 77 Am. St. Rep. 524, 46 L.R.A. 171; Flannigan v. Howard, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L.R.A. 664; Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266; Swick v. Coleman, 218 Ill. 33, 75 N. E. 807.

Editorial Comment

Few things are impossible to diligence and skill.—Samuel Johnson.

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Effect of War on Pre-existing Contracts

THIS timely subject was recently considered by an editorial writer in L.R.A.1916F, 71, where the topic is discussed with reference to the general question of the intervening impossibility of performance of a contract as a defense.

The general rule undoubtedly is that "all commercial intercourse with the inhabitants of the enemy's territory is, during war, unlawful. This interdiction of intercourse involves a prohibition against every species of private contract with a subject or citizen of the enemy." 6 R. C. L. § 122. And in a leading English case (Esposito v. Bowden (1857) 7 El. & Bl. 763, 119 Eng. Reprint, 1430, 24 Eng. Rul. Cas. 399), it was said that "it is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal."

Accordingly, it has been held that a declaration of war with a foreign country discharges executory contracts between citizens of the belligerent nations. This was held with reference to an executory contract for the importation of merchandise, in M'Grath v. Isaacs (1819) 1 Nott & M'C. 563. The decision was adhered to on a subsequent appeal in (1822) 2 M'Cord, L. 26. It should be observed that the contract in this case, although dealing with the importation of merchandise from England, was, it appears, between citizens of the United States. An executory contract for the transportation of goods from the United States to England was also held dissolved in Brown v. Delano (1815) 12 Mass. 370, by the declaration of war between England and the United States. Similarly, a declaration of war between England and Russia before breach of a charter party entered into by British subjects for the loading at a Russian port of a vessel belonging to the plaintiff with goods of the defendant, which made impossible the loading or receiving of the cargo without trading with the enemy, was held in Reid v. Hoskins (1855) 4 El. & Bl. 979, 119 Eng. Reprint, 365, to be a defense to an action for failure to load the vessel as agreed. A like result was reached in Avery v. Bowden (1855) 5 El. & Bl. 714, 119 Eng. Reprint, 647, affirmed in (1856) 6 El. & Bl. 962, 119

Eng. Reprint, 1119, 26 L. J. Q. B. N. S. 3, 3 Jur. N. S. 238, 5 Week. Rep. 45. So it was held in Esposito v. Bowden, supra, that the charterer, a British subject, was excused from compliance with an agreement to load a cargo at a Russian port by the breaking out of war between England and Russia, as performance had become impossible without illegal trading with the enemy.

But a contract to carry freight by ship between domestic ports is not dissolved by a declaration of war with a foreign government. Thus, it was held in Graves v. Miami S. S. Co. (1899) 29 Misc. 645, 61 N. Y. Supp. 115, not a defense to an action for breach of a contract to carry freight from Galveston to New York, that, after the making of the contract, war was declared between the United States and Spain, and, on account of the danger of loss of its steamers through seizure by the naval forces of Spain, the defendants discontinued the operation of its line of ships. The court said it was only where hostilities exist between the country to which the vessel belongs and the country for which it is bound that the contract of affreightment is dissolved; and that even had international complications rendered transportation more hazardous, the contract would have been unimpaired, and the defendant would have been compelled to submit to the increased peril.

But it has been held that a war between foreign nations preventing the performance of a contract does not excuse nonperformance. This rule was applied in Richards & Co. v. Wreschner (1915) 156 N. Y. Supp. 1054, with reference to a contract made in New York by a German partnership for the sale and shipment from Europe to New York of a quantity of "Belgium H. H. antimony." Shipments during the months of August and September, 1914, not being made according to the contract by reason of the German invasion of Belgium, the closing of the factory, and the prohibition of exportation by the German government, an action was brought for damages for breach of the contract. It did not appear but that the defendants might have procured the antimony from a warehouse in some nonbelligerent country of Europe, or that they could not have guarded against the contingency which arose, by providing a sufficient supply to make delivery during these months by shipment from some port in Europe. And it was held not a defense that performance was rendered impossible by the European war.

And in an action for breach of a contract made in May, 1914, to furnish a cargo of grain for shipment in August, 1914, from Baltimore to one of a number of European ports, as designated by the charterer, it was held not a defense that the outbreak of the European war had made performance impossible, or at least so changed conditions that the charter party should be regarded as at an end, it appearing that none of the ports named were blockaded, and that other shipments had been made about that time. Furness, W. & Co. v. Louis Muller & Co. (1916) 232 Fed. 186. To a similar effect is Furness, W. & Co. v. Fahey (1916) 232 Fed. 189.

Similar questions apparently were raised in the suits brought by bankers against the German liner Kronprinzessin Cecelie for failure to deliver gold bullion worth $11,000,000 which was on its way to Britain and France just as the war broke out. The Supreme Court of the United States has just decided in favor of the defendants, but the opinion is not available at this writing. The decision affects a large number of similar claims against a score of other German ships in American ports.

Intervening Impossibility of Performance of Contract as a Defense

A NOVEL case involving a pugilistic exhibition was recently determined. A professional boxer brought suit against a club to recover his stipulated per cent of the gross receipts of a boxing contest in which he had contracted to box his opponent to a draw. The referee stopped the fight in the second round, after the plaintiff's opponent had been disabled by a foul blow. The Wisconsin supreme court in Moha v. Hudson Boxing Club, — Wis. —, 160 N. W.

266, L.R.A.1917B, 1238, denied the right of the plaintiff to recover the contract price of his professional services on the ground that he had not shown substantial performance of his contract. Said the court: "He contracted to box ten rounds under certain rules. At the outset of the contest, in the middle of the second round, he violated one of the rules, and as a result thereof disabled his opponent, and thus by his own act made substantial performance impossible. Whether this act was deliberate or not cuts no figure. It was an act which he had contracted not to do, and it prevented performance."

Validity of Trust for Benefit of Employees.

DOUBTLESS the philanthropically inclined layman is often unaware that the law makes a distinction between trusts for charitable purposes, to which the rule against perpetuities does not apply, and trusts for purposes that are merely benevolent, which are not entitled to the benefit of the exemption. Mere kindness, generosity, or benevolence on the part of the creator of a trust is not enough to constitute a charitable purpose; there must also be the element of poverty or need on the part of the object, or else the gift must be dedicated to some purpose, such as education, religion, or the like, which the law regards as charitable.

This distinction is illustrated by an English case, Re Drummond [1914] 2 Ch. 90, 7 B. R. C. —, 83 L. J. Ch. N. S. 817, 111 L. T. N. S. 156, 30 Times L. R. 163, 58 Sol. Jo. 472, where a gentleman largely interested in a manufacturing concern bequeathed a block of stock therein upon trust to devote the income to the payment of the holiday expenses of the work people employed in a certain department of the concern in such manner as a majority of the directors of the company should in their absolute discretion think fit, the directors having power to divide the income equally or unequally between such work people. This was held not to be a good charitable bequest, although most of the persons employed in the department in question received a very small wage, upon the ground that there was nothing in the bequest or in the terms in which the discretion was given to the directors which imposed upon them the obligation of inquiring into the ability of the participants to provide themselves with holidays without assistance, or limited their power of contribution to cases where no holiday would be possible without such contribution.

So in an Irish case, Re Cullimore (1891) Ir. L. R. 27 Eq. 18, it was held that a bequest in trust to apply the income to the benefit and maintenance, and to enable the families of testator's late workmen or their children to become apprenticed or to emigrate abroad, did not create a valid charitable trust, the court remarking: "There is nothing here to show that the persons whom the testator meant to benefit were poor persons. . . . To be a workman is not necessarily to be necessitous."

The fact that the benefit of a trust for a purpose which the law recognizes as charitable is limited to the employees of a certain concern does not, however, affect its validity.

Accordingly a gift to form the nucleus of a fund for the purpose of pensioning off "the old and worn out clerks" of a firm in which testator was a member has been held to be a good charitable bequest by reason of the implication that it was for those of a class of persons unable properly to provide for themselves and their families. Re Gosling (1900) 48 Week. Rep. 300, 16 Times L. R. 152.

A trust for the erection of convenient and healthful tenements for the laboring classes, and their maintenance in proper repair and in a clean and tidy condition, providing that no intemperate, disorderly, or filthy person shall be allowed to occupy them, is a valid charitable trust, although they are to be let to laborers for rent, and not gratuitously furnished to them. Webster v. Wiggin (1895) 19 R. I. 73, 31 Atl. 824, 28 L.R.A. 510.

E. S. OAKES.

Among the New Decisions

With law must the land be built.—Danish Proverb.

Bills and notes — consideration — bank examination. Where a note is executed to a bank for the purpose of meeting the requirement of the state superintendent of banks that deficiency of the assets of said bank be made good, and for the purpose and with the result of enabling such bank to continue its business for some period, during which debts are created and new depositors acquired, neither the defense of want of consideration nor failure of consideration for such note is held available in an action brought to recover thereon by the state superintendent of banks in the Ohio case of State ex rel. Lattanner v. Hills, 113 N. E. 1045, L.R.A.1917B, 684.

Broker — compensation — concealment of facts. A broker employed to find a purchaser for real estate is held entitled to no compensation in the Arkansas case of Bennett v. Thompson, 189 S. W. 363, annotated in L.R.A.1917B, 919, if he conceals from his employer the true amount offered for the property, by reason of which the employer refuses to transfer the property.

Carrier — carrying passenger beyond destination — storm — proximate cause. A carrier which wrongfully carries a passenger beyond his station is held not liable in the North Carolina case of Garland v. Carolina, C. & O. R. Co. 90 S. E. 779, L.R.A.1917B, 706, for injury due to his being caught in an unexpected storm while walking back to his home, at least, if he might have escaped the storm had he not stopped at the home of an acquaintance *en route*, or had he stayed there longer than he did.

Case — mutilation of will — liability. One mutilating another's will is held liable in tort to a legatee who is thereby deprived of the provision which the will made for him in the North Carolina case of Dulin v. Bailey, 90 S. E. 689, annotated in L.R.A.1917B, 556.

Contempt — refusal of convict to testify. A court, it is held in the Arkansas case of Williams v. State, 188 S. W. 826, annotated in L.R.A.1917B, 586, may punish for contempt a convict who refuses to testify when brought before it as a witness, although there is no statutory authority to compel or to provide for his attendance.

But the court which sentenced one convicted of murder cannot, after he has begun to serve his sentence, suspend it for the purpose of punishing him for contempt for refusal to testify in another case.

Contract — implied — to pay for services of illegal wife. That a woman deceived into marriage with a man having a wife living may recover from his estate the value of the services rendered

by her to him as upon implied contract is held in the North Carolina case of Sanders v. Ragan, 90 S. E. 777, which is accompanied in L.R.A.1917B, 683, by supplemental annotation on the right to recover for household services rendered while the parties were living in illicit relations.

A conflict apparently exists on the question whether a woman who is deceived in her belief that she is lawfully married may recover for household services performed while living with her supposed husband.

Corporation — dividend — right to rescind. That a declaration of dividend on corporate stock, to be paid in scrip certificates which might be converted into cash, stock, or interest-bearing obligations, may be rescinded by the directors before the scrip is issued if adverse conditions affect the business, although enough surplus remains to satisfy the dividend, is held in Staats v. Biograph Co. 236 Fed. 454, annotated in L.R.A. 1917B, 728.

Corporation — foreign — failure to comply with laws — partnership liability. Holders of stock in a foreign corporation which has not complied with the laws entitling it to do business in the state, but which maintains an office and undertakes to carry on its business in the state, are held liable as partners for services rendered under contract with those in charge of the office, in the Tennessee case of Cunningham v. Shelby, 188 S. W. 1147, which is accompanied in L.R.A.1917B, 572, by a note in which it is said:

According to the weight of authority the failure of a foreign corporation to comply with the laws of the state in which it is doing business relative to foreign corporations does not render the stockholders liable as partners. At any rate, the partnership relation will not be extended to liabilities not arising by reason of the conduct of a business prohibited from being transacted without a permit. In one case it was sought to hold as partners two members of a foreign corporation whose names were combined into the corporate name on an indorsement by one of the defendants. No copy of the charter and by-laws of the corporation had been filed with the commissioner of corporations, and no copy of the vote appointing him attorney for the service of process had been filed with him. The court, after referring to this fact, states that the defendants are not thereby constituted partners, or made personally liable on the indorsement on the note.

There is some authority, however, for the view that until a foreign corporation has complied with the laws of the state in which it is transacting business, the corporate organization does not relieve its members from personal liability.

Where the fact that the corporation was organized for the sole purpose of doing business in another state does appear, the stockholders have, in a number of cases, been held liable as partners, especially if it was organized by citizens of the state in which the business is being conducted, for the purpose of escaping some provision of the law of that state. Thus, an individual who, with others, organized a corporation in a foreign state where the taxing laws were more favorable, has been held personally liable for obligations incurred by the corporation.

Criminal law — continuing offense — single conviction. But one conviction, it is held in Louisville & N. R. Co. v. Com. 171 Ky. 355, 188 S. W. 394, L.R.A.1917B, 544, can be had for failure to equip a particular train with accommodations for both white and colored passengers prior to the finding of the indictment first tried, where the train remains the same as to schedule time and equipment from day to day, although it is broken up each night and reassembled in the morning, where the penalty provided is for each offense, and not for each day's violation of the statute.

This is apparently the first case to pass upon the question whether or not cumulative penalties may be recovered for failure of a carrier to provide separate accommodations, etc., for white and colored persons, or whether a conviction or acquittal upon one indictment for such a failure bars a subsequent prosecution for other violations of the statute prior to the first indictment.

Damages — failure to transport live stock. The damages for delay of a carrier in furnishing cars to transport live stock to a particular market are held, in the case of Levy v. Nevada-California-Oregon R. Co. 81 Or. 673, 160 Pac. 808, L.R.A.1917B, 564, to be the loss in that market because of diminution of weight of the animals when they arrive below what it would have been had the contract been complied with, and not merely the depreciation at point of shipment.

Estoppel — to set up ultra vires of corporation. One borrowing money

from a corporation which it has no power to lend is held not estopped to set up the *ultra vires* of the transaction for the purpose of defeating an attempt to enforce repayment of the loan in Calumet & C. Canal & Dock Co. v. Conkling, 273 Ill. 318, 112 N. E. 982, annotated in L.R.A.1917B, 814.

Evidence — testimony in bankruptcy proceedings against corporation — use in criminal proceeding. Testimony given by an officer of a corporation in bankruptcy proceedings against it is held, in the Michigan case of People v. Lay, 159 N. W. 299, L.R.A. 1917B, 608, to be within the provision of the statute requiring the bankrupt to submit to examination, but forbidding the use of any testimony given by him as evidence against him in any criminal proceeding.

Fraud — false statement of offer for property. That one induced to take a lease at a higher rent than he offered, by a false statement that the higher rate had been offered by a stranger, may recoup the resulting damages in an action against him for rent, is held in the case of Caples v. Morgan, 81 Or. 692, 160 Pac. 1154, L.R.A.1917B, 760.

Hospital — negligence — death of wife — liability to husband. The owner of a private hospital, who, after undertaking to treat therein a woman with a broken hip, permits the room in which she is placed to be flooded with rain, causing her to contract pneumonia and die, is held liable to her husband, in the North Carolina case of Bailey v. Long, 90 S. E. 809, L.R.A.1917B, 708, for the mental suffering and loss of society and services resulting to him therefrom.

Husband and wife — alienation of affections — negligence. In order to recover damages for alienating the affections of his wife, a husband must show that the defendant took an active and intentional part in causing the estrangement. Such an action, it is held in the Minnesota case of Lilligren v. William J. Burns International Detective Agency, 160 N. W. 203, annotated in L.R.A.1917B, 679, will not lie where it is grounded solely upon the negligence of the defendant.

This seems to be a case of first impression as to right to predicate an action for alienation of affections solely upon the negligence of, or breach of contract by, defendant. The decision is in harmony with the rule that malice is an essential ingredient to such an action.

Husband and wife — liability of man for killing wife. Where married women are, by statute, given the right to sue and be sued and to enjoy in law and equity all rights as though sole, a man wrongfully causing the death of his wife is held liable in damages in Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460, L.R.A.1917B, 774, under a statute imposing liability in damages for wrongful death in case the person injured might have maintained an action had death not ensued.

Imprisonment for debt — violation of ordinance. That a municipal corporation cannot, under a constitutional provision forbidding imprisonment for debt, provide for imprisonment of one who refuses to pay for use of a vehicle which he has hired to transport himself or his property, is held in the Missouri case of Kansas City v. Pengilley, 189 S. W. 380, L.R.A.1917B, 551.

Incompetent person — employment of guardian. A guardian of an insane person, clothed with the management and control of the ward's property and affairs, is held authorized, without first obtaining the approval of the probate court, to employ an attendant to care for and render assistance to the invalid wife of the ward, in the Minnesota case of Re Mires, 160 N. W. 187, annotated in L.R.A.1917B, 676.

Insurance — confinement to house — walking as part of treatment. That one is not shown not to have been confined to his house or a hospital within the meaning of a health insurance policy, by the fact that, acting under the directions of his physician, he visited the office of the latter and walked or rode out as

part of the treatment prescribed by the physician, is held in the North Carolina case of Hines v. New England Casualty Co. 90 S. E. 131, L.R.A.1917B, 744.

Insurance — farm utensils — windmill and scales. That a windmill and farm scales are within insurance on farm utensils, although not in use, and stored in the farm buildings, is held in the Iowa case of Murphy v. Continental Ins. Co. 157 N. W. 855, annotated in L.R.A. 1917B, 934.

But one other case has been disclosed dealing with this question. In Phœnix Ins. Co. v. Stewart (1893) 53 Ill. App. 273, a hay press was held to be covered by a clause insuring for a stated sum "on reapers, mowers, harvesters, and other farming utensils." The court here said: "We are not inclined to hold, as insisted by appellant, that the term 'farming utensils' includes only such utensils as are generally used upon an ordinary farm. If the utensil is used in carrying on a particular kind of farm, as, for instance, a hay farm, it would be a farming utensil. Nor is it necessary to be in general use. The hay press is included within the term 'farming utensils.' "

Insurance — health — hernia — breach of representation. The existence of hernia, it is held in the North Carolina case of Hines v. New England Casualty Co. 90 S. E. 131, L.R.A.1917B, 744, does not *per se* avoid a policy of health insurance because of a breach of representation that insured is in sound condition, but the question whether or not it is sufficient to render the applicant unsound is for the jury; at least where the statute provides that no representations shall prevent a recovery unless materially affecting the risk.

Insurance — murder of insured — right of heir. Though by murdering the insured the beneficiary forfeits the right to the proceeds of the policy, such murder, it is held in the Minnesota case of Sharpless v. Grand Lodge, A. O. U. W. 159 N. W. 1086, annotated in L.R.A. 1917B, 670, does not absolve the insurer from liability to others. In such case the sole heir of the deceased, who would take upon the death of an eligible beneficiary, may recover.

The general rule, as evidenced by the cases, is that in case an insured is murdered by a beneficiary, the beneficiary forfeits all rights to insurance. It will be noticed that where the heirs of the beneficiary have been permitted to recover the proceeds of the policy, they have recovered not as such beneficiary's heirs, but as the heirs of the murdered assured.

Intoxicating liquor — manufacturing on shares — sale. The performance of a contract by which a distiller is to make brandy from a quantity of apples furnished by the other party and deliver to him one half the product when completed, keeping one half for his services, is held not a sale within the Local Option Law in Boggs v. Com. 172 Ky. 243, 189 S. W. 21, annotated in L.R.A. 1917B, 605.

Although there is some authority to the contrary, the cases seem to establish the rule in accord with the foregoing decision, that a contract for the manufacture of intoxicating liquors from materials furnished does not constitute a sale.

Judge — eligibility of suspended lawyer. That a lawyer is not, during the time of his suspension from the bar, eligible to the office of judge, under a constitutional provision that no person shall be so eligible unless he shall have been admitted to practise in the courts of record of the state, is held in the Washington case of State ex rel. Willis v. Monfort, 159 Pac. 889, L.R.A.1917B, 801.

This appears to be the only case passing directly upon the effect of disbarment of an attorney upon his eligibility to a judicial office.

Lake — running of division lines. That the lines of lots bordering on an oval non-navigable lake twice as long as it is broad, with regular shores which belong to the riparian owners, will be extended from the points where they touch the shore to and at right angles with a line drawn through the thread of the lake on its longest diameter, is held in the case of Calkins v. Hart, 219 N. Y. 145, 113 N. E. 785, annotated in L.R.A. 1917B, 783.

Malicious prosecution — service of process in foreign state. No action, it is held in the North Carolina case of Jerome v. Shaw, 90 S. E. 764, annotated

in L.R.A.1917B, 749, lies for malicious prosecution or wrongful abuse of process in the absence of seizure of person or property, although, both parties being residents of the same state, the summons was served in a foreign state, when the one seeking the damages was temporarily there.

There is but little direct authority upon the question whether an action for malicious prosecution may rest upon the institution and prosecution of a civil suit in a remote district or foreign jurisdiction, apart from an attachment of property or arrest of the person, or other special damage.

As appears from the preceding case and from Carpenter v. Hanes (1914) 167 N. C. 551, 83 S. E. 577; Harr v. Ward (1904) 73 Ark. 437, 84 S. W. 496; Brown v. McIntyre (1864) 43 Barb. 344; and Savage v. Brewer (1835) 16 Pick. 453, 28 Am. Dec. 255, in which the alleged malicious actions were instituted in a foreign country or another state, the mere fact that the civil action which is alleged to be the basis of an action for malicious prosecution was brought in a foreign jurisdiction seems to be immaterial, an action for malicious prosecution not being maintainable in such case, as in other cases, unless the defendant in the alleged malicious action was arrested or his property seized, or he suffered some special injury different from and in addition to that necessarily resulting from similar actions.

Master and servant — injury by leased machine — liability. The owner of a steam roller is held not liable in Hill v. Poindexter, 171 Ky. 847, 188 S. W. 851, L.R.A.1917B, 699, for injury caused by the fright of a horse due to its operation while it is in possession of a municipality to which he has leased it, and which has agreed to pay the wages of the servants operating it, and the cost of the fuel necessary to its operation.

Master and servant — wood thrown from engine — liability for injury. A railroad company is held not liable, in the Mississippi case of Mississippi C. R. Co. v. McWilliams, 72 So. 925, accompanied by supplemental annotation in L.R.A.1917B, 915, for injury to one walking along its right of way by wood thrown from an engine by a fireman, for his own use, without the knowledge or consent of the company, and against its rules.

Master and servant — workmen's compensation — injury by fall of ceiling — arising out of employment. Injury to a dishwasher in a restaurant from the fall of the ceiling due to the act of the occupant of the floor above, over which the restaurant keeper had no control, but which made the working place unsafe, is held to arise out of his employment within the meaning of the Workmen's Compensation Act, in the California case of Kimbol v. Industrial Acci. Commission, 160 Pac. 150, L.R.A. 1917B, 595.

Master and servant — workmen's compensation — injury out of state. A Workmen's Compensation Act, it is held in the Rhode Island case of Grinnell v. Wilkinson, 98 Atl. 103, L.R.A.1917B, 767, will apply to injuries to workmen employed in the state and injured while temporarily out of its limits in the performance of their duties unless there is something in its terms making it inapplicable, and a provision that the injured employee shall at reasonable times during his disability, if requested by his employers, submit himself to examination by a physician authorized to practise under the laws of the state, is not sufficient for that purpose.

Militia — liability of subordinate officers. Subordinate militia officers, it is held in Herlihy v. Donohue, 52 Mont. 601, 161 Pac. 164, L.R.A.1917B, 702, are not personally liable for obeying an order of their superior to destroy a stock of liquor of one who neglected to obey an order to close his saloon between certain hours, if the order might have been justified under certain circumstances.

Militia — personal liability for destruction of property. Militia officers called to suppress an insurrection are held personally liable, in Herlihy v. Donohue, 52 Mont. 601, 161 Pac. 164, L.R.A.1917B, 702, for destroying without hearing or adjudication the stock of a saloon keeper for neglecting to obey an order to keep his saloon closed between specified hours, where there is nothing to show necessity for such destruction, such as a threat of the rioters to break into the building to secure the liquor, so hat its destruction was neces-

sary to prevent the excesses which might follow the free access of disorderly persons to it.

Monopoly — price regulation — credit — validity. A contract by a wholesaler to furnish a stock of goods to a retailer who is to sell only the goods furnished at agreed prices and within a specified territory is held not to violate the anti-trust acts, in the Iowa case of W. T. Rawleigh Medical Co. v. Osborne, 158 N. W. 566; L.R.A.1917B, 803, if the contract required the supply of an unlimited quantity of goods on credit, to be paid for in instalments measured by an aliquot part of sales made, so that the provisions operated as security for the payment of the purchase price.

Mortgage — foreclosure — sale of entire tract. An execution issued upon a judgment of foreclosure of a mortgage on land, which is described in the mortgage, judgment, and execution as one entire tract, may be levied on the entire tract, it is held in Howland v. Morris, 141 Ga. 687, 82 S. E. 32, and the levy will not be excessive, although the value of the land may be much greater than the amount sufficient to satisfy the execution. Nor will a sheriff's sale of the entire tract, made in pursuance of such a levy, be void merely because the tract was capable of subdivision so that, by sale of a less quantity than the whole, a sum would be realized sufficient to discharge the fi. fa.

In the note appended to this case in L.R.A. 1917B, 513, it is stated: In a few instances stress has been laid upon the fact that the premises were mortgaged as an entirety rather than in parcels, some courts laying down the broad rule that where property is mortgaged as one entire tract and the decree is that the property described in the mortgage be sold, it may be sold in the same way, although it is readily divisible into or even consists of separate identifiable tracts; such courts maintaining that, where the mortgage and the decree describe the land as a single tract, the officer making the same is under no obligation to divide the tract and sell it in parcels, unless the court so decrees. And this notwithstanding a statutory provision that where property is taken on execution the same shall be sold in separate tracts if it is susceptible of division, although this conclusion may perhaps be attributed to a view that such statutes do not apply to sales under decrees of foreclosure; or notwithstanding an applicable statute provides that where the property consists of "several known lots or parcels they must be sold separately," if the property, although consisting of separate and "known buildings," does not consist of "known lots or parcels." These rules have been held to apply to a mortgage of a plantation and the personal property belonging thereto, to separate parcels of suburban and city property, to a single tract of land which the court, for the sake of argument, assumed would bring a larger total price if divided and sold in separate tracts, the action being one to enjoin the sale on foreclosure of the tract *en masse;* to two tracts upon which were separate buildings, which property was divisible according to buildings and the lands thereunder, but not divisible according to the original tracts; and to a single tract of land which had never been subdivided, in the mortgage of which there was nothing to indicate that it should be subdivided for the purpose of a sale on foreclosure.

Municipal corporation — unsafe street — liability. A city is held liable in the Minnesota case of Hillstrom v. St. Paul, 159 N. W. 1076, L.R.A.1917B, 548, for negligently failing to keep its street safe for public use, and the fact that the dangerous condition of the street resulted from negligence in caring for an instrumentality used by its fire department does not relieve it from such liability.

Pardon — pending appeal — validity. A pardon granted pending appeal, after a verdict of guilty, is held valid under constitutional authority to grant a pardon after conviction, in State ex rel. Barnes v. Garrett, 135 Tenn. 617, 188 S. W. 58, annotated in L.R.A.1917B, 567.

Parent and child — liability for surgeon's bill. A father whose advice is sought as to the desirability of an operation upon his minor daughter, earning her own living away from home, and who consents thereto, and suggests that he would have chosen another surgeon had he known the full circumstances, may be compelled, it is held in the Tennessee case of Wallace v. Cox, 188 S. W. 611, accompanied by supplemental annotation in L.R.A.1917B, 690, to pay the surgeon's bill, since the circumstances do not indicate that the daughter had been fully emancipated.

Partnership — name — sufficiency of surname. The use of the surname is held sufficient in Com. v. Ritchey, 171 Ky. 330, 188 S. W. 397, L.R.A.1917B, 697, under a statute permitting the transaction of a partnership business under a partnership name including the true name of at least one of the persons conducting the business, without filing a certificate setting forth the names of the members of the firm, and therefore a business may be conducted by father and son under a name consisting of the father's surname followed by the words "& son."

Perjury — acquittal of criminal charge — effect. Acquittal of one charged with crime is held no bar to a prosecution for perjury for testimony given by him at the trial, in Teague v. Com. 172 Ky. 665, 189 S. W. 908, accompanied by supplemental annotation in L.R.A.1917B, 738.

This decision conforms with the great weight of authority in holding that, although one has been acquitted at the trial at which false testimony was given, the acquittal does not bar the prosecution of such person for giving false evidence on that trial.

Sale — condition — bankruptcy — priority. That a stock of goods sold with reservation of title in the vendor until the purchase price is paid, but which may be resold at retail, will not pass to a trustee in bankruptcy of the purchaser as against the claim of the vendor to possession of the property for the purchaser's default, is held in Andre v. Murray, 179 Ind. 576, 101 N. E. 81, L.R.A.1917B, 667.

Sale — placing of seed on commission — passing of title. A consignment of seed in response to an order, to be sold by the consignee at prices and upon terms to be fixed by him, the consignee to account on demand for all seed sold at invoice prices less commission, and the consignor to take back all seed unsold at invoice prices, is held in D. M. Ferry & Co. v. Hall, 188 Ala. 178, 66 So. 104, annotated in L.R.A.1917B, 620, to constitute a sale and the passing of title, although the order states that the seed is to be sold on commission and a label on the packages states that the seed is placed on commission, not sold outright.

Sale — to retailer — condition — retention of title. The retention by a wholesaler of drygoods of title to the goods and their proceeds in a sales contract under which the goods pass to a retailer for resale is held effective against a chattel mortgage executed by the retailer to a trustee for creditors, in Mishawaka Woolen Mfg. Co. v. Stanton, 188 Mich. 237, 154 N. W. 48, annotated in L.R.A.1917B, 651, on the validity of conditional sale contracts as affected by an express or implied permission to the purchaser to sell in the ordinary course of business.

The weight of authority holds that the mere fact that the conditional-sale purchaser is authorized to sell in the ordinary course of his business, as to his creditors, puts him in substantially the same position as that occupied by an agent under a consignment contract, and the validity of the contract of sale is sustained as to creditors.

On this point there is in Michigan apparently a conflict between the state and Federal courts.

Service — jurisdiction of Commission — effect of raising judicial question. That the California Railroad Commission is not deprived of its jurisdiction over the service of a public utility is held in the case of Palermo Land & Water Co. v. Railroad Commission, P.U.R.1917A, 447, by reason of the fact that the company in good faith disputes the right of a complainant to require service, and thereby raises a judicial question.

Service — jurisdiction of Commission — number of telephone messages. That the Illinois Commission has no jurisdiction over a dispute between a telephone company and a subscriber as to the number of messages sent from his telephone is held in the case of Fulton v. Chicago Teleph. Co. P.U.R.1917A, 527.

Tax — hospital — exacting pay for services — effect. That a charge is made for services rendered by a hospi-

tal to help defray its expenses is held not to render it taxable, in Dayton v. Speers Hospital, 165 Ky. 56, 176 S. W. 361, accompanied by supplemental annotation in L.R.A.1917B, 779, if it was founded by funds donated for that purpose, and is operated as a public charity.

Practically all of the cases in the earlier note as well as those since decided hold that charitable institutions do not lose their right to public aid or exemption from taxation by requiring inmates to pay for the privileges or care received by them therein.

Tax — interstate commerce — validity. That no unconstitutional interference with interstate commerce is effected by a statute imposing upon automobiles passing through the state, together with those owned and used in the state, a license tax for revenue purposes, the proceeds of which are to be applied to the upkeep of the highway, is held in Kane v. State, 81 N. J. L. 594, 80 Atl. 453, L.R.A.1917B, 553.

Valuation — municipal acquisition — rate base — earnings. In fixing the value of a gas utility for municipal acquisition, in the California case of Re Palo Alto, P.U.R.1917A, 163, consideration was given to the rate base, and an additional allowance made because the net earnings were in excess of 8 per cent and were steadily increasing.

Valuation — overhead expenses — organization. That a utility's organization expense may be included in a municipal acquisition valuation is held in the California Case of Re Palo Alto, P.U.R.1917A, 163.

Vendor and purchaser — failure to make improvements — rescission. One who has paid the purchase price and taken possession of real estate cannot, it is held in the Tennessee case of McMillan v. American Suburban Corp. 188 S. W. 615, in the absence of fraud, mistake, or insolvency of vendor, rescind the contract for the vendor's breach of his agreement to lay water mains to the property, but he must rely on his legal remedies.

Recent decisions on this question are appended to the report of the foregoing case in L.R.A.1917B, 401, the earlier authorities having been collected in 21 L.R.A.(N.S.) 823.

Writ — service on attorney — attendance on court. An attorney is held not exempt from service of civil process while attending court in a professional capacity in a county other than that of his residence, in the Arkansas case of Paul v. Stuckey, 189 S. W. 676, annotated in L.R.A.1917B, 888.

The cases as to an attorney's right to exemption from service of process while attending court in a county other than that of his residence are in conflict.

Some of the courts have come to the conclusion that public policy does not justify an exemption of attorneys from the service of summons while they are attending court in a foreign county or foreign state, while others hold that such an exemption is justified on the ground of public policy; *i. e.*, for the purpose of securing the fair and unhampered administration of justice in the courts. There would appear to be a much stronger ground for upholding the exemption from service while an attorney is actually engaged in the trial of a cause than where he is not, at the time, actually attending court; as, for example, where service is attempted to be made while he is waiting for a train, to return to his home, and this distinction has been emphasized in some of the cases.

The court decided in the foregoing case that an attorney, while trying a case in a county other than that of his residence, was not exempt from the service of summons in a civil suit, the court holding that such service was not against public policy, and that a statute exempting from service witnesses attending court in a county other than that in which they reside did not apply to attorneys. In this case the attorney was called from the court room while engaged in the trial of a criminal case, and the summons was served upon him at the door of the court room; the facts, therefore, presented a strong case for arguing in favor of the attorney's privilege.

Recent English and Canadian Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Bastards — sufficiency of evidence to establish paternity. Testimony given by the prosecutrix in a bastardy proceeding as to the paternity of her child is not sufficiently corroborated by evidence that the parties, by the nature of their employment, had opportunity of intercourse. Burbury v. Jackson [1917] 1 K. B. 16.

Building contract — setting aside specified sum for heating apparatus — principal contractor as owner's agent in making subcontract therefor. That a building contract by which a builder contracted for a lump sum to build a school in accordance with the specifications and directions of the architect, one of the items specifying that the builder should "provide the sum of £450 for a low pressure heating apparatus," the performance of which item it was within the discretion of the architect to dispense with, did not constitute the builder the agent of the building owners in employing a specialist to furnish and install the heating apparatus,—is held in Hampton v. Glamorgan County Council [1917] A. C. 13.

Contracts — provision for suspension upon contingencies "preventing or hindering delivery" — war — shortage of supply — rise in price — unprofitableness. That a rise in price of an article occasioned by a shortage of supply due to war cannot be considered as "preventing or hindering" delivery thereof, within the meaning of a provision in a contract for the sale of a quantity of such article, that deliveries may be "suspended pending any contingencies beyond the control of the sellers or buyers (such as . . . war . . .) causing a short supply of labor, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article," is held by a divided court in Wilson & Co. v. Tennants (Lancashire) [1917] 1 K. B. 208.

Corporations — transfer of shares — limitation on power of directors to refuse to register transfer. A power conferred upon directors by articles of incorporation to refuse to register transfers of shares if, "in their opinion, it is contrary to the interests of the company that the proposed transferee should be a member thereof," only justifies a refusal to register upon grounds personal to the proposed transferee. It does not justify refusal to register transfers of single shares, or shares in small numbers, because the directors do not think it desirable to increase the number of shareholders, or because they think that the transfer is not bona fide, but that the transferee is the mere nominee of the transferrer, and the transfer is made to increase the number of shareholders who will support him in a policy which the directors disapprove. Re Bede Steam Shipping Co. [1917] 1 Ch. 123.

Criminal law — evidence of accomplice — corroboration — nature of corroboration required. The law applicable to the corroboration of evidence of accomplices is elaborately reviewed and restated in Rex v. Baskerville [1916] 2 K. B. 658, where it is said that although there are some propositions applicable to corroboration which are beyond controversy, as, for example, that "confirmation does not mean that there should be independent evidence of that which the accomplice relates," as in such case his testimony would be unnecessary, and that the corroboration must be by some evidence other than that of an accomplice, so that one accomplice's evidence is not corroboration of the testimony of another accomplice, there is a difference of opinion on the question whether the corroborative evidence must connect the accused with the crime; and that the better view is that the evidence of the accomplice must be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner

as the person who committed the crime, so that if the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, it is not corroborative evidence.

Death — wrongfully causing as actionable injury. The common-law doctrine that "in a civil court the death of a human being cannot be complained of as an injury" has been so generally accepted that only an exceptional state of facts causes it to come into question. Such was the case in Admiralty Comrs. v. The Amerika [1917] A. C. 38, an action brought by the British Admiralty Commissioners against the owners of a steamship which, in consequence of negligent navigation, ran into and sunk a submarine, the crew of which was drowned, for damages consisting of the capitalized amount of the pensions payable by the Admiralty to the relatives of the deceased men, and in which the basis of the common-law rule is interestingly examined.

Infants — contract for purchase of land — provision for forfeiture in case of default — right to recover moneys paid. A contract for the purchase of land entered into by an infant, which contains a forfeiture clause under which in the event of default he may lose the land and everything he has paid, and under which he did not get possession nor a selling title nor a right to specific performance, is, according to a decision of the Ontario Appellate Division in Phillips v. Greater Ottawa Development Co. 38 Ont. L. Rep. 315, 33 D. L. R. 259, to the prejudice of the infant, and accordingly is not merely voidable and so capable of ratification by the infant after attaining majority, but is absolutely void; and the infant may recover payments made by him during his minority.

Insurance — health policy — provision limiting liability of insurer to case of illness necessarily confining assured to house. A provision in a policy of insurance against illness whereby the insurer undertakes to pay a stipulated sum in the case of any illness which "necessarily confines the assured to the house for a period beginning during the said term and prevents the assured throughout the period of such confinement from performing any and every kind of duty," renders the insurer liable in the case of one who, in consequence of a nervous breakdown, is incapacitated from doing any work, although while suffering from such malady he was accustomed to take drives and walks for the benefit of his health. Guay v. Provident Acci. & Guarantee Co. Rap. Jud. Quebec, 51 C. S. 328, 33 D. L. R. —.

Master and servant — action for wrongful discharge — mitigation of damages — deduction of profits of business venture. The case of Cockburn v. Trusts & Guarantee Co. 37 Ont. L. Rep. 488, 32 D. L. R. 451, noted in the February issue of this magazine as holding that in assessing the damages sustained by an employee who has been wrongfully discharged, the extent of their mitigation is to be measured by the amount which he might have reasonably been expected to earn by the exercise of ordinary diligence and exertion to obtain similar employment in which he would be called upon to render substantially similar services, and not by the profits derived from the business conducted by him on his own account, has been reversed in 38 Ont. L. Rep. 396, 33 D. L. R. 159, on the ground that, though such profits resulted from his risk of his responsibility and assets as well as from his employment of his time and ability, what he did was the consequence of the situation caused by the breach of contract.

New Books and Periodicals

Men disparage not antiquity who prudently exalt new inquiries.—Sir Thomas Browne.

"Standards of American Legislation." By Ernst Freund (The University of Chicago Press, Chicago, Ill.). $1.50 net, postage extra (weight 1 lb. 10 oz.).

Under this title Professor Freund presents, in somewhat expanded form, the substance of a series of lectures delivered by him. The volume is offered as a contribution to the rapidly growing movement for the improvement of our statute law. It suggests the possibility of building up a system of principles that should guide and control legislation.

Professor Freund's thoughtful discussion will serve to stimulate interest in the possibilities of the subject.

"Cases on Legal Ethics." By George P. Costigan, Jr. (West Publishing Co., St. Paul, Minn.). $4.00.

This latest addition to the American Case-book Series embodies a wealth of valuable material on an important subject concerning which law students have seldom received adequate instruction. There have been many disbarments for conduct which was due to pure ignorance of the ethical duties of lawyers to courts, to clients, to fellow practitioners, and to the public.

Some of the chapters of this work are devoted to the consideration of "The Lawyer's Qualifications," "The Admission and Discipline of Lawyers," "The Ethical Duties of Lawyers to Courts," "The Ethics of Legal Employment in General," "Solicitation of Legal Business," "The Ethical Duties of Lawyers in Civil and Criminal Cases," "Pecuniary Relations of Lawyers and Clients."

The volume contains pertinent extracts from many cases, the questions and answers published by the Committee on Professional Ethics of the New York County Lawyers' Association, and extracts from classic moral discussions.

This latest work on legal ethics may well be considered the moral code of the profession.

"The Civil Law and the Church." By Charles L. Lincoln (The Abingdon Press, 150 Fifth Ave., New York). $5.00 net.

The principal judicial decisions concerning church problems have been collected in this valuable work, the plan of which is encyclopedic, the subjects being arranged alphabetically. The author does not undertake an interpretation of the authorities or a statement of the decision from his own point of view, but rather presents, and often in the language of the court, the decisions as actually rendered.

The volume is a ready reference manual of the principal cases considered by the courts of Great Britain, Canada, and the United States on distinctively religious matters. Decisions rendered with reference to particular denominations, contracts, taxes, schisms, property rights, rights and duties of ministers, ecclesiastical councils, etc., may here be conveniently traced and compared with similar cases.

The field covered by this work is of great importance. Church officers, laymen, and lawyers alike will find the volume helpful when questions arise relating to the spiritual or material interests of the church.

"The Offender." By Burdette G. Lewis (Harper & Brothers, New York). $2.00 net.

The subject of prison reform is treated in this book in such a way as to make it of value for the judge, the lawyer, the student, and the prison manager and official, as well as for the general reader and the growing number of those whose humanitarian and sociological interests include offenders. The author is commissioner of the largest department of correction in the world. The book is based on experience, science, and common sense, and is primarily constructive.

Mr. Lewis presents practical and helpful suggestions for dealing with the various phases of the many-sided problem of the offender. There are chapters dealing with the court, with the different systems of classification, with probation and parole, with the clearing-house laboratory for scientific investigation, with the indeterminate and the definite sentence, with autocratic government and dis-

cipline and other systems of government, including the so-called modern self-government system, with institutional organization and treatment, with prison labor, with industrial training, with details of institutional management, and with institutional procedure.

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Troublesome behavior, originating in mental conflict, "ranges widely from mere faults of social attitude to severe delinquency and crime dependent upon uncontrolled antisocial motivation or impulse. Cases having this causation occur so frequently that specific knowledge of their nature should be part of the equipment of all who have to pass judgment or to advise concerning misdoing and misdoers." The well-defined relations of Dr. Healy's findings to the vastly important problems of sex education and sex hygiene determine for us some practical points of prevention of certain types of misconduct arising from sex sources.

We have here a work that must prove of absorbing interest and of great use to professional people, pastors, judges, court and institution officers, as well as to parents,—indeed to all who deal with adolescents and children, and who wish to understand them.

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This work aims to formulate specifically the problems of specialized abilities and disabilities of human beings. The presentation of the subject is based not only on laws of mental life, but on the experience that many case studies have afforded.

This is the first attempt to make a deep analysis of the psychology of school children in relation to their individual needs.

For the psychologist there are special sections giving data upon which diagnoses and recommendations are founded. For the physician who nowadays is frequently making diagnoses of mentality there is, beside the case studies, much discussion of the differential diagnosis. This is a work that must fundamentally challenge the educator and the psychologist who is interested in applications of his science to human adjustments. It will be of great value for students of education, for those interested in mental testing, in vocational adaptations, and other phases of applied psychology. It also offers much of interest to social workers, parents, and employers.

"The Elements of Business Law." By Ernest W. Huffcut. Revised by George G. Bogert (Ginn & Company, Boston). $1.12.

A text-book in business law should be the work of one who is a great jurist and a great teacher. Such is Huffcut's Elements of Business Law, which has now been revised by Professor George G. Bogert of the College of Law at Cornell. The book has been brought up to date by noting changes in American law during the eleven years which have elapsed since the first edition was published, and especially those alterations due to important statutes such as the anti-trust legislation, the various uniform laws, the Federal Reserve Act, the Employers' Liability and Workmen's Compensation Acts.

The simplicity and accuracy of style of the old edition have been strengthened rather than weakened in the revision; its logical plan of stating concisely fundamental principles and following them up with concrete examples has been preserved; and the problems and questions, so important in the successful teaching of the subject, have been retained and improved.

"Cases on the Law of Private Corporations." By Daniel F. Burnett (Little, Brown, & Co., Boston). $5.00.

This collection of cases has been carefully selected with a view to aiding the student in acquiring a knowledge of the living body of the law of private corporations. The subdivisions of the work treat of the nature of a corporation, its charter, powers, internal mechanism, dissolution, and reorganization, and the rights of creditors.

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"Patriotic Essays." By Elroy Headley, Newark, N. J. (Second Edition.)

In this little volume of short essays the author appeals for a higher standard of American citizenship. He believes that our national weakness or strength depends upon the public interest in the affairs of the day, and that it is necessary to direct the efforts of all the people toward maintaining personal thrift, industry, and righteous conduct. He discusses such subjects as "The Principles of Americanism;" "Reverence to the Flag;" "True Efficiency;" "Brotherhood," etc. He dedicates his work to all who love virtue, liberty, and patriotism.

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It is stated in the preface that the preparation of this work has extended over a period of eight years.

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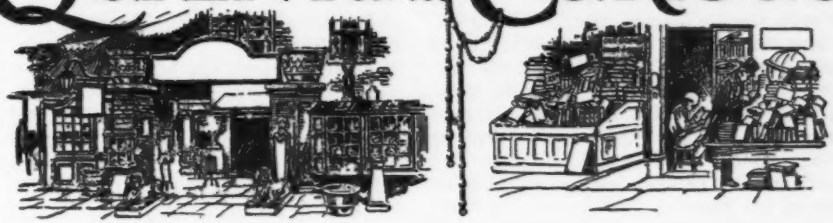
QUAINT and CURIOUS



The moving finger writes; and, having writ, moves on.—Omar Khayyam.

Fact is Stranger than Fiction. The habit of naming their children after relatives, thereby keeping alive forever such family names, was a controlling factor in the Caldwell family even before leaving Ireland and locating on Virginia soil in 1700. Such names as John, James, Joseph, and Samuel seemed to constitute three fourths of their vocabulary of given names, and these were handed down from father to son, generation after generation, with unceasing loyalty. It was left to their descendant John Caldwell of Mammoth Spring to issue forth an edict that he would break loose from these family names which form a distinguishing characteristic of the Virginia Caldwells and therefore named his first boy Norris. This John Caldwell was an attorney, and he hoped to make a lawyer out of his son.

Young R. was on his way to medical college at Nashville, and arrived at Mammoth Spring after dark. He bought his ticket, checked his trunk, and retired for the night, intending to leave on the 5:40 train next morning. That night a heavy snow fell. When R. appeared at the station next morning his trunk was missing. Later in the day he called at Caldwell's office and stated the facts to him. The trunk had been stolen from off the truck on the station platform, and they decided that they could track the thief in the snow. Starting out on this mission, they discovered a "string" of box cars near the depot which were used by a "bridge gang." Behind this string of box cars were many large piles of railroad crossties. Back of these they saw the missing trunk, and, as luck would have it, the supposed thief taking things out, apparently examining them, and throwing back what he didn't care for. Caldwell never believed much in circumstantial evidence, but as they caught this man in the act they lost no time speculating, but took him into custody at once. This man said he was a member of the bridge gang, and that his name was Norris. As it happened this was the first person Caldwell had ever seen with this name except his son. Norris denied stealing the trunk or of knowing anything about it being brought there. He claimed also that he had a brother who was sheriff of some county in Wisconsin. Caldwell prosecuted the case at preliminary hearing, and Norris was bound over to the grand jury, which indicted him promptly. Caldwell looked upon Norris the criminal, and hoped that Norris, his son, would never know such a life. S., once lieutenant governor of his state, was a brother-in-law of young R. and an exceptionally successful criminal lawyer. When Norris was brought to trial in the Fulton circuit court, S. prosecuted him. Norris was convicted of stealing R.'s trunk and sentenced to the penitentiary. His plea of "not guilty" was merely formal and entered with little comment. Norris appeared dazed and absent-minded during his trial and seldom spoke to anyone and asked few if any favors. His attitude was that of one bewildered or lost in the sea of helplessness and indecision. Caldwell repeatedly declared in this case that there was no circumstantial evidence to weaken one's belief that they had the guilty

person, as Norris was caught in the act. While waiting in jail at Salem for the sheriff to convey him to the penitentiary, Norris went violently insane. Many derisive remarks were heard on every hand in regard to his "assumed" mental infirmity. He was incarcerated in the penitentiary at Little Rock. From there he was transferred to the violent ward in the Hospital for Nervous Diseases and confined in a padded cell for the remainder of his life.

During this time citizens of Missouri were missing their live stock and suspected a member of this bridge gang named Tow. Becoming desperate at the delays of the law, several Missourians marched boldly across the Arkansas line to where Mr. Tow was resting after his noon meal one day, and bodily carried him over the state line into Missouri and placed him securely in jail at Alton. This man Tow laughed at their efforts to restrain his liberty and openly defied them to keep him until their court met. He boastingly declared that he was far too shrewd for them to keep confined in any jail, and that unless they deliberately turned their back on him he would feel obliged to escape before their very eyes.

One morning a small package was delivered to Caldwell from this man Tow. Accompanying it was a note from Tow saying that since Caldwell assisted in sending to the penitentiary an innocent man for stealing R.'s trunk, he might soothe his conscience a little by forwarding the package to Norris. The package contained articles belonging to R. Tow explained how he stole the trunk, hid it behind the ties, supplied himself leisurely with the choicest articles therefrom, leaving it where it was found. Norris had merely noticed the trunk setting out there in the snow and through sheer curiosity had walked up to it and was looking at its contents and wondering why and how such a trunk came to be out there in such condition when Caldwell and R. rushed up on him. Caldwell was about to go to Alton to obtain a full confession from Tow, but heard that Tow had escaped jail that night. About the same hour a man stealing a ride on a freight train near Cabool was run over and his body mashed almost into a pulp. The body was identified, however, by articles belonging to R. and by Missouri officers as the body of the escaped prisoner Tow from Alton jail.

Though Norris was being punished for Tow's crime, yet, after all, the career of Tow on earth was ended in tragedy. Sympathy naturally turned to Norris then, but to no avail. He was a mental and physical wreck, and a little later himself died in his madhouse tomb. Tragedy seemed to close his life's chapter as well as that of Tow. While Caldwell looked with loving admiration upon his son Norris, he could not keep from thinking of Norris, the unfortunate victim of Fate, and offering a silent prayer that life's end with his son Norris would be filled with less of tragedy. Later, while Caldwell was attending circuit court at Salem,—the same town in which the innocent Norris was convicted,—his son Norris at Mammoth Spring was burned to death. Tragedy! It seemed from that moment that the word tragedy rang in Caldwell's ears with a different meaning than had ever been registered upon his nerve centers before. Just the word itself brought to Caldwell's mind the name of Norris. The name of Norris also brought to his mind with equal force the thought of tragedy.

Young R. graduated with honors in college and located at B. Immediately afterward, in a personal difficulty, he was killed in the street of his home town. The end of his life thus wrought by tragedy left only two who had taken part in the prosecution of Norris,—the supposed criminal. Young R.'s slayer was indicted for first degree murder and promptly brought to trial. Considerable feeling existed against the defendant, and this same S. who had prosecuted Norris for the theft of R.'s trunk was employed to prosecute R.'s murderer. No one can quite imagine Caldwell's feelings when, in the midst of the most impassioned appeal ever heard in that district, S. fell dead in the court room at the feet of the jury. Tragedy had steadfastly and faithfully kept her vigilance and, one after another, marked the end of the life of all but one

who participated in the prosecution of the unfortunate and innocent Norris.

Caldwell still lives and—waits. He thinks of these events often and says little. There seems to be much behind the case which is hidden in the shadows of mystery. Caldwell wonders even now if one can safely believe his own eyes. Over him creep sensations that mock all power of description as he recounts in his own mind the details of this one experience. Sometimes he feels that, after all, circumstantial evidence is the surest and safest guide to human events. In that instance, at least, the eyes of man deceived more perfectly and harmfully than any other agency of God's creation. Caldwell has never accepted another criminal case. Some believe he never will.—Lehman George Sinclair.

The Kun'l Jedge. Senator Ollie James tells of a "kun'l jedge," an undisputed czar in his county in Western Kentucky, who disposed of cases that came before him with severity or clemency, according to their merits in his eyes, and without regard to law or precedent.

In one instance, two old negroes went to law about a certain mule, which each accused the other of having stolen. Inasmuch as the case presented many amusing features, the "Kun'l Jedge" enjoyed it the first day as a sort of special performance for his entertainment; but the second day he summarily dismissed court, in order to go with a hunting party.

"Now, see heah, I'm tired of listenin' to all that nonsense. One or the othah of you stole that mule, and it's mighty plain to my mind that evah last one of you have been up heah swearin' to a pack of lies. Unc' Mose, you can keep that mule,—you was the last one to git him. Unc' Joe, you 'long up to the big house and tell Son Bob I said to give you that ol' black mule outer the pasture. Now evah one of you cleah out, and if I evah find out who stole that mule, I'll punish him yet. Co't's dismissed till day aftah tomorah,—no, better make it next Monday. We'll be down in the bottom three or four days, won't we, Zeb?"

Animal World Law. The punishment that birds and animals mete out to their criminals, and the court and legal proceedings connected with it, furnish an interesting field of study.

An interesting example of an animal trial is furnished by an observer. A little dog had, for no apparent reason, been mistreated by a larger bulldog. At once the little fellow scoured the neighborhood and collected all the bones he could find, burying them in the cellar of a house. When he had succeeded in securing a sufficient number, he issued invitations to all the canines in the neighborhood, the bulldog alone excepted.

The guests came from all directions, the halt, the lame, and the hungry. When justice had been done to the banquet, the host arose and made an eloquent after-dinner speech, in which he laid before the assembled company his case. They heard him through, then declared the offending and absent bulldog to be guilty and at once proceeded in a body to carry out the sentence of chastisement.

A scene, quite common among rooks, is described by an ornithologist. The culprit, brave and jaunty, stood surrounded by forty or fifty of his indignant mates. As the trial progressed the accused little by little lost his jaunty air and hung his head in humiliation. When the sentence had been pronounced the court at once fell to and pecked him to death.

It is quite common in early spring for young and inexperienced sparrows to steal twigs and other building material from the nests of their elders. If this theft is detected, as it usually is, a posse promptly visits the offender's nest and scatters it to the four winds, soundly thrashing the occupant in the bargain.

A story is told of a sparrow who had stolen the nest of a martin, and was making himself comfortable in it. The angry owner summoned all his friends and immediately they came, several hundred strong, but the intruder held them at bay for some time by pecking all who came near enough to the opening. Finally the avengers withdrew and held a consultation. In a few moments they returned, each with a mouthful of mud, and proceeded to plaster up the hole, walling the occupant up alive.

The story is told that a French surgeon, wishing to procure a stork, but

being unable to do so, stole some eggs from a nest and substituted hen's eggs. The innocent female hatched them out, but the male, angry at the strange appearance of his offspring, went away. Three or four days later he reappeared, accompanied by several others, who formed a circle about him while he argued his case. The jury without retiring brought in a verdict of "guilty," and the poor, innocent mother was executed.—Nebraska Legal News.

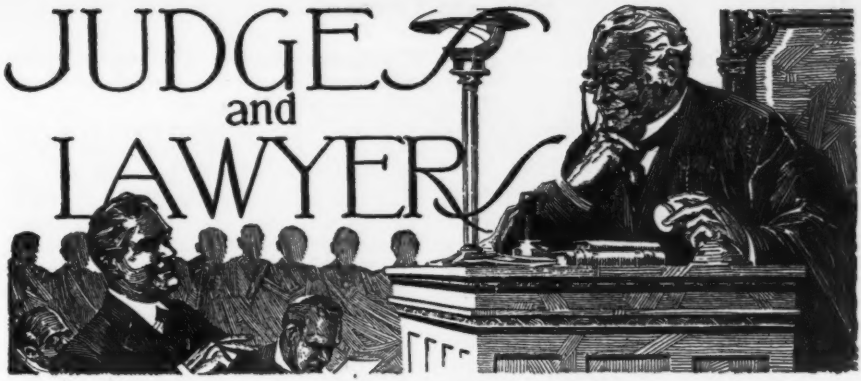
A Pointed Joke. A joke has cost a company $5 a week for a period not exceeding four hundred weeks, $50 for medical expenses, and $150 for legal fee. The manager of a store heard a good joke and told it to a woman employee. It happened that just then she had her month full of pins and she laughed so hard she swallowed half the pins. Then she collected damages because the joke was too pointed—or the pins were.—Utica Press.

A Literary Enthusiast. "I shall plead guilty, your Honor, to the charge of smashing this shopkeeper's window," said a hobo who was arraigned before the police magistrate at Tucson, Arizona, on a charge of malicious mischief, "because I did smash it as a part of my general plan for obtaining the necessary material for a book I am about to publish. But I want this court to understand that in me it has before it a different sort of person from those who usually appear here. I am an English gentleman, a cousin only three times removed from Sir John Bugglestone of Bugglestone Manor, Essex, England. I am an author. I am writing a book on prison life in Yankeeland, and in order to obtain material for my book and impart local color to it, it is necessary that I become an actual inmate for a short time of each jail whose occupants and whose environments I describe. The jails of eleven states have had the privilege of entertaining me for a few days each, and I am now on my way to the Pacific slope to complete my labors. I paused here to obtain material for a graphic and picturesque description of jail life in Arizona. I have found that the easiest way of obtaining access to these places of confinement was to smash a shopkeeper's window in each town, and accept in consequence a brief sojourn in the county jail. Wherefore, your Honor, I am here."

"May I inquire of you, Sir John Bugglestone's Third Cousin," said his Honor, "whether it has been a part of your practice on such occasions, to remunerate the shopkeepers for their shattered lights?"

"Why, no, your Honor," replied the accused, "I have not really considered it necessary to do so. The incarceration which I suffered in consequence of each act was supposed to square accounts with the shopkeeper, doncherknow."

"Quite so," said the judge. "Well, Sir John Bugglestone's Third Cousin, when you write your chapter on prison life in Arizona, you might mention that in this wild and woolly west our courts entertain the same idea with respect to the end to be obtained by the punishment of criminals that prevailed in the now effete East before it became debauched by trans-Atlantic precedents. Here we hold that punishment of the criminal is designed, partly at least, to protect society by deterring him from further acts of wrongdoing. This court appreciates your enterprise, your spirit of sacrificing yourself, and your thrift, in not paying the losses of your victims in your pursuit of the noble calling of a British author. But plate-glass windows are costly hereabouts, and in order to save the merchants of neighboring towns from the iconoclastic brickbats and paving stones which may be precipitated by literary enthusiasts upon their shop windows, and also to afford you an ample opportunity to gather a full supply of local color for your forthcoming book, I will sentence you to four months' imprisonment at hard labor on the rock pile. The views of life, and of the rights of other people that this discipline will impart to you will be of benefit to you in your subsequent career, and the public roads of this county, as well as the literature of England, will be improved by your labor. Constable, remove Sir John Bugglestone's third cousin."—Thomas Fitch.



A Record of Bench and Bar

John G. Johnson

One of America's Greatest Lawyers

JOHN GRAVER JOHNSON, who died in Philadelphia on April 14, was one of the ablest lawyers of this country. "Probably he was without an equal in his mastery of the intricacies of the laws governing the organization and management of industrial and public service corporations," states the New York Evening Post, "though his vast legal knowledge was not restricted to any one branch. In his later years, however, he was chiefly known as a corporation lawyer, and his fame will rest upon his adroit conduct of memorable suits in which great corporations were involved. He had refused high appointments in the public service. Two Presidents offered him a seat in the nation's highest court, another failed to induce him to accept a Cabinet office. He clung to the last to his practice, which lately had been almost wholly confined to consultations. He was noted for his moderate charges, not because he did not accept high fees when they were justly earned, but because he invariably refused to receive more than he felt his services were worth. His advice was sought by financiers and judges, by the responsible managers of municipalities. He acquired large wealth in spite of his disinclination to overestimate the value of his services.

"Mr. Johnson was born of poor parents and made good use of the opportunities American life offers to the competent and industrious. With no more than a high-school education, he entered a law office in a humble capacity and developed his natural powers by persistent study and hard work. He had natural gifts of an exceptional kind, and a mind fitted to comprehend all the details of legal theory and practice. His single avocation was the collection of paintings. He took delight in the ownership of master works, and his knowledge of law was scarcely greater than his knowledge of fine arts. He lived and died among his pictures. His vast collection of old masters, we believe, has never been appraised by the dealers. Its artistic worth, however, is of international repute."

"In his purchases of paintings Mr. Johnson did not stick to orthodox old masters," states the New York Times. "He used independent judgment in buying great and minor pictures of the periods in which he specialized. He also did as he pleased about hanging his pictures, some being placed on the back of doors, others on the foot of beds, and some on the ceiling of his house. In spite of the fact that the same catholicity of taste is exhibited in his paintings as in his variety of law cases, his collection has been ranked by competent critics with

the three or four best private collections left in America. In a review of the collection printed in the Times on June 7, 1914, after a catalogue of the collection had been printed for private circulation, it was said:

"Undoubtedly the rarest works and those upon which an orthodox collection rests most securely for its prestige are to be found among the Italian paintings. There are Pesellino's 'Virgin and Child Between Two Saints,' an early Correggio, a portrait by Botticelli of extreme historical as well as esthetic interest, and a beautiful predella by that master, recounting the legend of Mary Magdalen, a magnificently dramatic 'Pieta' by Crivelli, and a decorative pair of panels by Cima da Conegliano, Carpaccio's tender 'Story of Alcione,' a 'Virgin and Child' by Giovanni Bellini, a 'Magdalen Reading' by Luca Signorelli, authentic specimens of Basaiti and Catena, and other paintings that in more than one instance represent masters to be found in but few of the great European galleries.

"From these wide-eyed Italian Primitives one turns, however, with a quickened spirit to the Flemish and Dutch pictures, of which the collection possesses remarkable examples. Among these Pieter Breughel's two characteristic compositions, and a noble array of pictures by Jan Steen, more than any other American collection possesses, claim particular attention."

A story is told of Mr. Johnson which illustrates the practical view he took of picture buying. On one occasion an English critic questioned the authenticity of one of his favorites, asserting the original was to be found in England. When Mr. Johnson replied quietly that he knew he had the genuine canvas, the Englishman asked, with a touch of sarcasm:

"You are a lawyer. What do you know about pictures?"

"Yes, I'm a lawyer," returned Mr. Johnson, "and I can't lay an egg. But I know a bad one when it is handed to me."

As soon as he began his law practice he found that very few lawyers really knew corporation law, and he made up his mind to learn it, and did. Before he was thirty-five his statement, "The law says," had become what it has been ever since, authoritative. He knew corporation law as few other lawyers in America have ever known it.

For fifteen years and more few great cases have been argued before the United States Supreme Court in which John G. Johnson did not appear. He defended the Sugar Trust, the American Tobacco Company, the Standard Oil Company, the Northern Securities merger. He was retained as counsel by the Amalgamated Copper Company, the Pennsylvania Railroad, the New York Central Railroad, the United States Steel Corporation, the American Distilleries Company, the National Hardware Association, between sixty and eighty banks, and practically every other great corporation in the country. In the past three decades it is said approximately $400,000,000 were invested in corporate interests on John G. Johnson's recommendation.

When he was in Norway a few years ago a group of railroad men planned a merger, but were unwilling to take legal steps until they obtained his opinion. They cabled him an outline of the plan, and received immediately this reply: "Merger possible. Conviction sure."

"His power of memory, intensely trained, made him remarkable very early in his career for the vast amount of law which he carried in his head," observes a writer in the New York Times. "To the last it was impossible to catch him at fault in his citations of law, even when he quoted copiously from memory on a new point arising in the trial of a case. But memory never gained a tyranny over his other powers. He was too economical of words to indulge in feats of recollection, except as required for the support of his argument.

"As he economized words as he did time, Johnson was never eloquent. There was no polish or adornment to his arguments. A colleague of the Philadelphia bar thus described him: 'Johnson goes straight to the point and hits it hard. He has not the polish of Choate, for instance, nor any of the old-fashioned "oratory." He gets hold of the real point at issue and will not be turned from it. He fuses it into a thunderbolt in the heat of argument.'

"He did not make a practice of employing humor or sarcasm in his arguments,

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JOHN GRAVER JOHNSON

This portrait is said to be the only authentic one for which Mr. Johnson ever gave a sitting.

but the few flashes of his wit which are preserved are good. In one case where his opponent based his argument on law taken from Gilbert Bacon's Digest of English Law, while Johnson cited American decisions, Johnson turned to the court and said: 'Surely your Honor is not going to prefer a little bit of English Bacon to the whole American hog.'

"Mr. Johnson's opinions have influenced law in courts wherever the English language is spoken, and his name with English lawyers is as great as with the American bar. When Chief Baron Palles, the noted Irish jurist, was in this country a few years ago, he said that the man he was most anxious to meet was John G. Johnson.

"'Of course,' he said, 'everybody knows that Mr. Johnson is the greatest lawyer in the English-speaking world.'"

Miss Clara Greacen

A Woman Lawyer Employed as a Specialist in the Treasury Department

ONE of our ablest lawyers in the Federal service is Miss Clara Greacen, of Kalkaska, Michigan. Miss Greacen is one of the assistants of the Comptroller of the Treasury. Her regular duty is the preparation of decisions upon questions of law and accounting coming before the Comptroller, especially those pertaining to our Navy.

Some of her special duties have been the drafting of the employment contracts for the construction of the new Alaskan Railroad, which have operated so successfully, the revising and standardizing of government regulations, and the preparation of a report on recent laws enacted and strengthened affecting women and children and action thereunder. Women's clubs are utilizing the information contained in this report. This subject of the progressive legislation for women is one in which she is deeply interested. Miss Greacen is a member of the bar of the District of Columbia, of the Women Lawyers' Association of the District, and of the College Women's Club.

Of Miss Greacen's work Honorable W. W. Warwick, the present able Comptroller, in an article in the Washington Star, said:

"She is very competent and of unusual ability as an investigator of difficult questions. She has a fine judicial mind, and has attained great experience in writing out legal questions. The years she spent in preparing herself for her special work were profitably filled, and she has shown the result in her capability for accomplishing a great deal of hard and valuable work. She is a shining example of a woman in the government service at Washington qualifying as a specialist, and special work is what counts in the service as well as out of it. I am an admirer of women of ability who are endeavoring to make a place for themselves as real workers, and I am pleased to pay tribute to one who has done valuable work in this office."

Hon. James E. Watson

U. S. Senator from Indiana

SENATOR Watson graduated from De Pauw University in 1886 and was admitted to the bar in 1887, when in his twenty-third year. He practised law with his father, the late Enos L. Watson.

He removed to Rushville in 1893, and was elected to Congress in 1894 over the veteran, William S. Holman. He was defeated for the nomination in 1896 in a newly made district by Henry U. Johnson; but was re-elected in 1898, 1900, 1902, 1904, and 1906. Mr. Watson served on the Ways and Means Committee and was Republican whip of the House.

He was elected United States Senator in November, 1916, defeating Senator Taggart. His term of service will expire in 1921.

Hon. Richard Olney

Eminent Lawyer and One of Our Greatest Secretaries of State

THE old Puritan will, "its resolution, doggedness, steady courage, public spirit, its strength, tenacity, and power to hit, were abundant in Richard Olney, accompanied with a capacious and crystalline intellect," states a writer in the New York Times. "He focused his thought upon a law case, a constitutional question, an international question. He made the marrow of the situation, the essence of the facts and the law, absolutely clear. He stated the case plainly, luminously, dynamically, without fat of rhetoric, but with a bony structure visible to every eye. He reached his conclusions carefully. Then he hammered them in; and the court, the country, the world, as the case might be, was never in doubt of his meaning. He was one of the most uncompromising characters in our history. He cared nothing for consequences. He was above popularity or unpopularity. What is the fact? What is the law? What is the right? That was all he wanted to know."

Mr. Olney was appointed Attorney General by President Cleveland in 1893, and he served two years and three months before he was called to the State Department to succeed Walter Q. Gresham as Secretary. It was Mr. Olney who, during the Debs railroad strike in Chicago, counseled the calling out of the Federal troops. He defended that action successfully in an argument before the Supreme Court. He bent his energies upon asserting that the law of the United States was supreme throughout the entire country and that the interests of no section must be prejudiced by interference with the free use of the railroads in the carrying of the mails or with the enjoyment of interstate commerce.

Although Richard Olney occupied the office of Secretary of State for only one year and nine months, his name will go down in history as one of the greatest Secretaries that ever held the portfolio of the State Department. He will perhaps best be remembered for his handling of the question of the boundary dispute between Great Britain and Venezuela. His methods were those of a strong and well-equipped lawyer rather than of the politician, and he gained reputation in his office by his intellectual strength and sturdy purpose.

Disregarding the warning that a rigid maintenance of the Monroe Doctrine might plunge this country into war with Great Britain, President Cleveland and Secretary Olney successfully insisted upon the arbitration of the boundary dispute between the empire and Venezuela.

In his famous message sent through Ambassador Bayard to Lord Salisbury, British secretary of state for foreign affairs, Mr. Olney, premising the inalienable right of the United States to intervene in questions affecting the territorial integrity of South American countries, said in part: "Great Britain both admits that there is a controversy and that arbitration should be resorted to for its adjustment. But while up to that point her attitude leaves nothing to be desired, its practical effect is completely nullified by her insistence that the submission shall cover but a part of the controversy; that as a condition of arbitrating her right to a part of the disputed territory, the remainder shall be turned over to her. Upon what principle—except her feebleness as a nation—is Venezuela to be denied the right of having the claim heard and passed upon by an impartial tribunal? 'It is so, because I will it to be so,' seems to be the only justification Great Britain offers."

Although Lord Salisbury at first refused to submit to the American demand, upon further representations he receded from his attitude and agreed to the arbitration of the entire dispute.

This was the boldest and most startling proceeding in defense of the Monroe Doctrine that had ever been undertaken.

His other great act was the negotia-

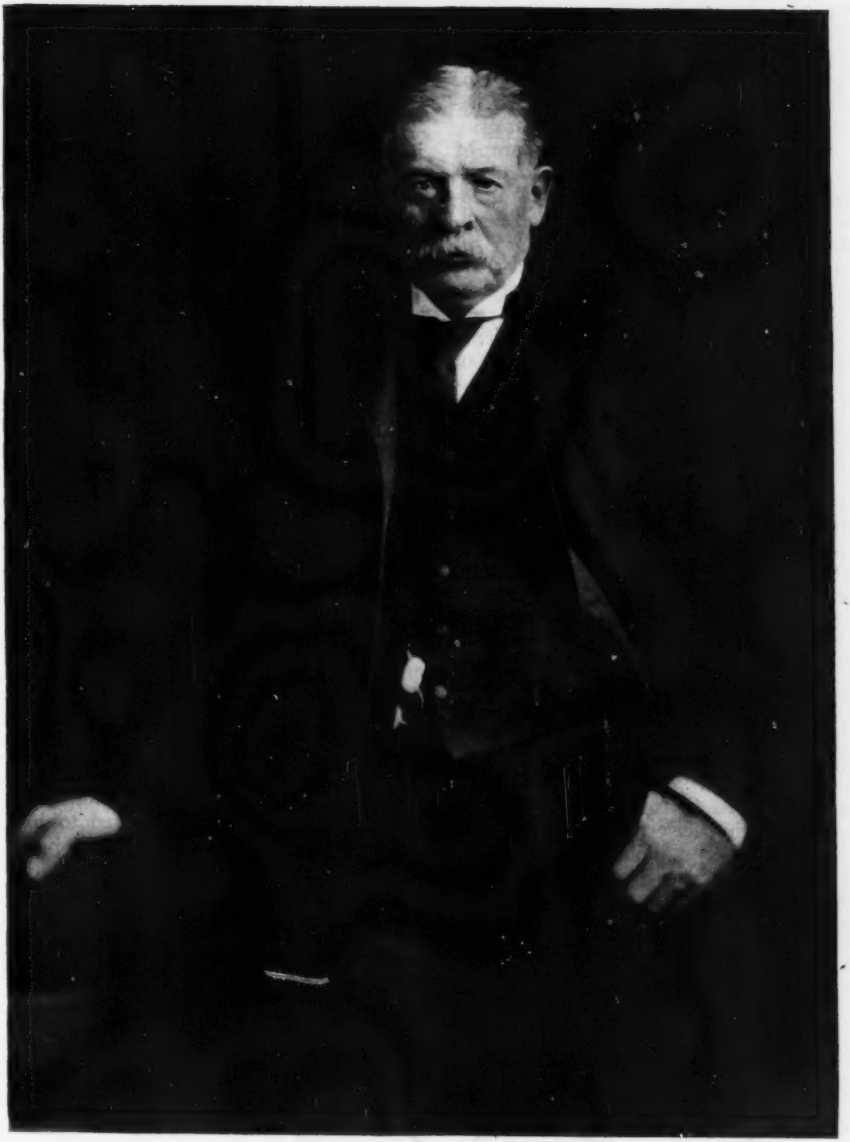


Photo by Boston Photo News Co., Boston, Mass.

HON. RICHARD OLNEY

tion of a general arbitration treaty with Great Britain for the settlement of future disputes between the two nations. This treaty was afterwards defeated by the Senate of the United States, but its defeat does not detract from the great principles of humanity and patriotism by which it was actuated, from its acknowledged merits, or from the skilful diplomacy with which it was drawn and negotiated.

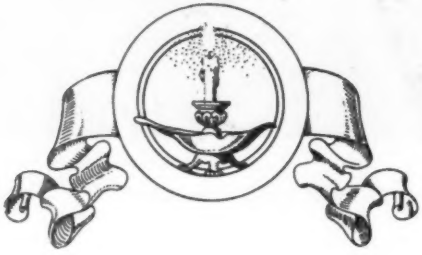
Upon retiring from official life in 1897, Mr. Olney resumed the practice of law in Boston.

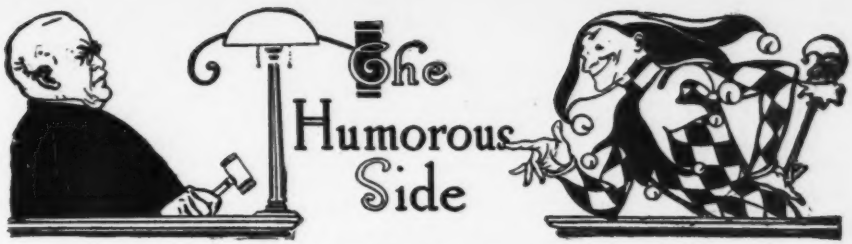
Prompt and thorough in his legal work, Mr. Olney speedily gained an enviable reputation as a chamber counsel. It has been declared that in his presentation to the court of a question of law he was not excelled by any lawyer in New England. In the earlier part of his career he was a frequent trier of causes before juries; afterwards his practice became mostly confined to that of an adviser of large corporate interests and to the settlement of estates. His appearance in courts became rare.

Richard Olney was born in Oxford, Massachusetts, on September 15, 1835, the son of Wilson Olney, a textile manufacturer and banker. Shortly after his birth his father moved to Louisville, Kentucky, and there the boy grew up until his seventh year, when the family moved back to Oxford. Young Olney was sent to the Leicester (Mass.) Academy, and, after completing his course there, he went to Brown University, where he was graduated with high honors, being class orator, in 1856. He went directly to the Harvard Law School, and two years later received his degree of Bachelor of Laws. He was admitted to the bar in 1859. He became associated with the late Judge Benjamin Franklin Thomas. He soon made a name for himself and won high place as an authority on matters of probate, trust, and corporation law.

He occasionally published articles and delivered addresses upon public questions. In the Atlantic Monthly for May, 1898, was published an address delivered by him at Harvard University upon the "International Isolation of the United States," and in the March, 1900, issue of the same magazine was published an equally clear and strong article by Mr. Olney upon "The Growth of Our Foreign Policy." In 1897 Mr. Olney was offered a post as professor of international law at Harvard. He received the honorary degree of LL. D. from Harvard and from Brown in 1893 and from Yale in 1901. He was a member of the Massachusetts Historical Society, the American Philosophical Society, and a former Regent of the Smithsonian Institution. At the time of his death, on April 8, he was in his eighty-second year.

Mr. Olney's characteristics as an advocate have thus been described by a competent pen: "His logic is keen cut, his diction is wonderfully pure, his rhetoric is always perfectly adapted to his subject; his power of condensation is remarkable; his argument presents a view of the case that is a perfectly adjusted series of perspective."





"E'en grim-visaged Law can smooth his wrinkled front and smile."

Not Named. A witness in describing an event said:

"The person I saw at the head of the stairs was a man with one eye named Wilkins."

"What was the name of the other eye?" spitefully asked the opposing counsel.—Collegiate Lawyer.

Lost. The late Gilman Marston of New Hampshire was arguing a complicated case, and looked up authorities back to Julius Cæsar. At the end of an hour and a half, in the most intricate part of his plea, he was pained to see what looked like inattention. It was as he had feared. The judge was unable to appreciate the nice points of his argument.

"Your Honor," he said, "I beg your pardon, but do you follow me?"

"I have so far," answered the judge, shifting wearily about in his chair, "but I'll say frankly that if I thought I'd find my way back, I'd quit right here."—Minneapolis Journal.

Not a Thinker. During his vacation a lawyer met an old friend in the village and their conversation drifted to a discussion of the natives. A young farmer came under their view.

"He's a fine looking young fellow," said the lawyer.

"Ye-e-es," assented his friend.

"Well, anyway, he has a mighty good head."

"It ought to be good," was the reply, "That man's head is brand new—he never used it any."

Too Restricted for Him. "You have sworn to tell nothing but the truth."

"Nothing but the truth, your Honor?"

"Precisely."

"Then, Judge, with that limitation upon me I might as well warn you that I'm not going to have much to say."—Detroit Free Press.

Added Offense. Country Justice: Ten and costs for reckless driving.

Young Motorist: Listen, Judge! We were on our way to your office to have you marry us.

Justice: Twenty and costs, then. You're a darned sight more reckless than I thought you were.—Judge.

Safe. Servant: I can't get this 'ere tail light to burn, sir.

Country Doctor: Oh, never mind. We're only going home, and I've got the constable safe in bed with lumbago.—Liverpool Globe.

Choice Company. An Irish witness was once asked:

"What do you know of the defendant's reputation?"

"Faith! I know this—that rather than live wid her I'd marry the Divil's daughter and go home and live wid the ould folks."—Top-Notch.

That Did It. His aunt was rich and elderly. She had called, unexpectedly, when he was out, and his wife was trying to entertain her by such methods as she thought to be best conducive to their future welfare.

The old lady had recently added a gramophone to her establishment, and when she heard that early that morning her loving nephew had made for her a

record of her favorite cornet solo, she was delighted.

"How nice of him!" she said. "Can I hear it?"

"Well," said her niece, "we haven't tried it yet, but, still, Ill put it on." It was a pronounced success, and the old lady was charmed.

But her feelings changed when, after the solo was finished, the instrument brought out with fatal clearness:

"Phew! If that's not good for an extra hundred in the old girl's will, I'm a Dutchman!"

Believed in Preparedness. Mrs. Jenkins had missed Mrs. Brady from her accustomed haunts, and, hearing several startling rumors concerning her, went in search of her old friend.

"They tell me you're workin' 'ard night an' day, Sarah Ann," she began.

"Yes," returned Mrs. Brady. "I'm under bonds to keep the peace fer pullin' the whiskers out of that old scoundrel of a 'usban' o' mine, an' the magistrate said if I come afore 'im ag'in, or laid me 'ands on the old man, 'e'd fine me 50 shillin's."

"An' so ye're workin' 'ard to keep out of mischief?"

"I'm what? Not much! I'm workin' 'ard to save up the fine!"—Nebraska Legal News.

Source of Affection The sympathetic visitor to the jail saw that one of the prisoners had a rat in his possession.

"Ah, you have a rat, I see," he said blandly.

"Yes, Sir," said the prisoner. "I feeds him every day. I think more of that rat than any other living creature."

That reply pleased the visitor immensely.

"In every man," he said, "there is something of the angel left if one can only find it. How came you to take such a fancy to the rat?"

"'Cos he bit the jailer."

Faithful to His Promise. One of the recruiting canvassers in an English provincial town was a well-known magistrate. In most cases he succeeded in obtaining the promises he wished, but at last he knocked at one cottage door, which was opened to him by a sturdy son of the soil.

"My man," said the magistrate in his most persuasive tones, "are you willing to fight for your King and country?"

"No, I beant, sir," was the prompt reply. "An' I be surprised at your askin' for to do it. Two years ago came next month, you yourself fined I 20 shillings for fighting Bill Smith and you said it wor wicked to fight, an' I promised you as I wouldn't repeat the offense, an' allus kept my word."—Buffalo News.

No Apprehensions. "So Crimson Gulch has gone for prohibition."

"That's what it has," replied Broncho Bob.

"Isn't it going to drive some of the old topers to desperation?"

"Not a chance. What's the good of desperation if there ain't no drink for it to drive you to?"—Washington Evening Star.

Its Oddity. There is one thing in a lawyer's profession which is different from any other.

"What is that?"

"The longer he is at it the more he has of a brief career."—Baltimore American.

A Grasping Mind. "Eight hours work, eight hours rest, and eight hours recreation, you know," said the man who likes proverbs.

"Yes," replied the weary citizen. "Maybe some time Congress will be hurried up to pass a law looking out for the rest and the recreation."—Evening Star.